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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1986

LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

Petitioner,

v.

HARVSTONE MANUFACTURING CORP., DURAY FLUORESCENT MANUFACTURING CO., AMERICAN FLUORESCENT CORP. and HOUSE-O-LITE CORP.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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10 pp

QUESTIONS PRESENTED

1. Under the National Labor Relations Act, 28 U.S.C. § 151, *et seq.*, may employers, during collective bargaining for a new agreement, refuse to begin to pay the last cost-of-living wage increase that was due and payable under the provisions of the expiring Agreement?

2. May a group of employers, contrary to this Court's Decision in *NLRB* v. *Truitt Manufacturing Co.*, 351 U.S. 149 (1956), refuse to allow a Union to look at their books after their chief negotiator told the Union's chief negotiator, that one of the four companies was losing money, and the others may lose money and go out of business, if the cost-of-living increase was granted?

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To: The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States

PRAYER

Petitioner, Local 134, International Brotherhood of Electrical Workers, AFL-CIO, Intervenor in the Court below,

respectfully prays that a Writ of Certiorari issue to review the Opinion of the United States Court of Appeals for the Seventh Circuit entered in this case.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit, modifying and enforcing in part and denying in part, the Decision of the National Labor Relations Board, that found a violation of 29 U.S.C. § 758(a)(1) and (5) by the four Respondents, is reported at 785 F.2d 570, and is reproduced in the Appendix hereto.

JURISDICTION

The Opinion of the United States Court of Appeals for the Seventh Circuit was filed March 6, 1986 (App. p.1a to 26a). A Petition for Rehearing, with Suggestions for Rehearing In Banc, timely made, was denied on April 10, 1986 (App. p. 27a). This Petition is filed within 90 days thereof. The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254.

FEDERAL STATUTORY PROVISIONS

28 U.S.C. § 158(a)(1) and (5) provides in pertinent part as follows:

> (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

LIST OF PARTIES TO THE PROCEEDING

The parties listed in the caption of this case, plus the National Labor Relations Board, are all of the parties to this proceeding.

STATEMENT OF CASE

The Decision of the Court of Appeals for the Seventh Circuit modified and enforced in part, as to Respondent Duray, the National Labor Relations Board Decision, and denied enforcement as to Respondents Harvstone, American, and House-O-Lite. The National Labor Relations Board Decision adopted the recommended Order, as modified, of the Administrative Law Judge, in which he found repeated violations of the National Labor Relations Act by all four employers unilateral changes in wages and other economic benefits of its employees during the course of Collective Bargaining. The recommended Order of the Administrative Law Judge, had issued following a Hearing upon a Complaint that alleged various violations by the employers' unilateral reduction in wage rates and other economic benefits paid to their employees under the Collective Bargaining Agreement negotiated with the Petitioner in 1979. The Complaint issued upon Unfair Labor Practice Charges filed by the Petitioner, which alleged numerous unilateral changes in economic benefits to the employees of the four employers, from August 31, 1982, and primarily the unilateral refusal by each of the employers to implement the final cost-of-living increase that was negotiated in 1979, and payable August 30, 1982.

STATEMENT OF FACTS AS TO COST-OF-LIVING INCREASE

The Union and the four employers had negotiated identical Collective Bargaining Agreements in 1979 that provided for cost-of-living increases for the contract year of September 1, 1979 to August 31, 1980 and similar time periods in 1981 and 1982. The relevant Collective Bargaining Agreement language, (Joint Exhibit 1 before NLRB) reads as follows:

> "*Section 4. Review and Effective Dates. During each contract year* the applicable Base Index shall be compared

to the BLS Index published for the months of January and July, as follows:

Review Dates	Effective Date of Required Adjustment
Following Publication of applicable BLS Index for	
January	March 1
July	September 1

"If the BLS Index at a review date does not exceed the Base Index for the contract year, no cost of living adjustment is required. Where a comparison establishes that the applicable BLS Index at the review date exceeds the Base Index, then a cost of living adjustment shall be made in accordance with the provisions of Section 5.

"Each cost of living adjustment shall become effective on the first day of the pay week nearest the date on which the increase becomes due."

* * *

"*Section 6. Second and Third Year Cost of Living Reviews and Adjustments (Second Year—9/1/80 to 8/31/81; Third Year—9/1/81 to 8/31/82).* The procedure described in this Article for determining cost of living adjustments arising during the first contract year *shall be applied in the second and third years* and separate cost of living adjustment schedules shall be prepared *for each year and incorporated in amendments to this Agreement.*" (Emphasis added)

The majority of the Court of Appeals for the Seventh Circuit made the finding of facts, in their part of the Court's Opinion, as follows:

> Intrinsically, the adjustment issue itself involves nothing more than a debate over contractual interpretation. The collective bargaining agreements, which expired on August 31, 1982, provided that cost-of-living adjustments would be effective on each March 1 and September 1 during the life of the agreements. The amount of each adjustment was to be calculated based on changes in the CPI. The relevant review date of the CPI for the March 1

adjustment was the preceding January and the review date for the September 1 adjustment was the preceding July. The debate centers around whether the Respondents were obligated to make an adjustment effective September 1, 1982, even though the agreements between the parties expired on August 31, 1982.

The Union, arguing that the relevant point of reference is the July 1982 review date, maintains that since the changes in the CPI took place during the life of the agreements, that the parties must have intended the adjustment to reflect these changes even though the actual adjustment was not effective until after the agreements expired. In support of its proposition the Union cites *Meilman Food Industries, Inc.*, 234 N.L.R.B. 698 (1978), *enforced without opinion,* 593 F.2d 1371 (D.C. Cir. 1979).[1] In *Meilman,* the Board ruled that a cost-of-living adjustment had accrued to the employees' benefit even though its effective date fell after the expiration of the collective bargaining agreement. In so doing, however, the Board relied explicitly on the fact that the agreement clearly established that the relevant time for determining when the adjustment had accrued was the review date, which fell during the life of the agreement. 234 N.L.R.B. at 698, 704. Basing its decision on the specific language of the agreement, which "is clear on its face and requires no construction or interpretation beyond its plain meaning," the Board held that the adjustment was due and payable even though the effective date fell outside of the life of the agreement. *Id.*

Although the Union contends otherwise, the instant case differs from *Meilman.* The Union's agreements with the Respondents did not place importance on the review dates for determining when the cost-of-living adjustments

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[1] The Union's reliance on *Struthers Wells Corp.*, 262 N.L.R.B. 1080 (1982), *modified,* 721 F.2d 465 (3d Cir. 1983), is inapposite. In *Struthers* the court held that an employer did not violate the Act by refusing to grant a cost-of-living adjustment where both the review and effective dates were beyond the term of the collective bargaining agreement. *Id.* at 472. The court expressed no opinion as to the vitality of *Meilman* in the Third Circuit other than to note that *Meilman* was distinguishable from the case before it.

actually accrued. Our reading of these agreements leads us to conclude that the January and July review dates were merely points of reference from which the amount of the adjustments was to be ascertained. There is no language in the agreements establishing the review dates as the time at which the cost-of-living adjustments became contractually enforceable rights in the hands of the employees. Indeed, unlike *Meilman* in which the review dates were definitively established as being each May 15 and November 15, the review dates in the Respondents' agreements were to occur sometime following the publication of the CPI for the appropriate January or July. This lack of any established date for such review is further evidence that the review dates have no significance in determining the Respondents' obligations to pay cost-of-living adjustments. We therefore find that the Respondents' contractual duty to pay such adjustments arose, and the employees' rights to such adjustments accrued, only on the effective dates during the life of the agreements. Since the September 1, 1982, effective date occurred after the expiration of the collective bargaining agreements, the Respondents were not obligated to pay the adjustment in question.

Even conceding the above, the Union nonetheless contends that the adjustment actually became payable to the employees on August 30, 1982, just prior to the expiration of the agreements. To support its assertion, the Union relies on language contained in Art. XIX, § 4 of the agreements that mandated that the adjustment be paid beginning "on the first day of the pay week nearest the date on which the increase becomes due." The Union contends that since September 1, 1982, was a Wednesday that the adjustment, in accordance with the agreements, became payable to the employees on Monday, August 30. This argument, however, puts the cart before the horse. Pursuant to the agreements themselves, the adjustment was due on the first day of the week in which it became effective. What the Union's argument overlooks is that the adjustment in question here *never* became effective. Since no adjustment was due on September 1, the employees were not entitled to any increase on August 30. The

Respondents did not violate the Act or their agreements by bargaining to an impasse over the cost-of-living adjustment.

(App. p. 17a to 19a)

STATEMENT OF FACTS AS TO THE REFUSAL TO FURNISH COMPANY RECORDS

The Seventh Circuit, in the majority's portion of the Opinion, propounded, is the pertinent facts, as follows:

> The Respondents are all manufacturers of fluorescent lighting fixtures in the Chicago area. Since 1964 the Respondents have recognized, bargained with and individually executed several collective bargaining agreements with the Union. The last of these agreements were three-year pacts that expired on August 31, 1982. The unfair labor practice charges which are the subject of this action arose out of negotiations between the Respondents and the Union beginning in August 1982. During these negotiations, all four Respondents were represented by Ray J. Schoonhoven. Although theoretically each bargaining session was limited to negotiations regarding one particular employer, the parties recognized that the final agreements between the Union and each Respondent would be substantially identical.
>
> The Respondents came to the bargaining table seeking concessions from the Union claiming that they were operating at a competitive disadvantage relative to their counterparts in other portions of the United States. To substantiate their claim, the Respondents prepared a schedule comparing the wages and benefits paid by several of their competitors, also represented by the International Brotherhood of Electrical Workers, with their own labor costs. This schedule, which was given to the Union, purported to show that the costs paid by these competing manufacturers were significantly less than those incurred by the Respondents.
>
> Armed with these figures, the Respondents met with Union representatives during pre-negotiation sessions during the spring and summer of 1982, and commenced actual negotiations toward new collective bargaining agreements on August 11 of that year. During these sessions, the

Respondents proposed a reduction in wages, insurance and pension benefits, and the elimination of cost-of-living adjustment clauses. The Union, on the other hand, stated that it would make no concessions and, in fact, initially proposed a wage increase. Additionally, in response to the claims of competitive disadvantage, the Union sought the Respondents' financial records claiming that if the employers were predicating their bargaining stance on economic problems, they were required to produce substantiating data. The Respondents' only response was that they were not pleading inability to pay.

In total, the parties met eight times during August 1982, with the final session taking place on August 31, the day the collective bargaining agreements between the parties expired. Throughout these eight sessions, apart from the concessions the Respondents were seeking, another bone of contention was a cost-of-living adjustment which the Union claims accrued to the employees' benefit on August 30, 1982. The Respondents contend that the cost-of-living adjustment was not part of the expired collective bargaining agreements. During the life of the agreements, cost-of-living adjustments became effective each March 1 and September 1. The adjustments were based on reviews of the Bureau of Labor Statistics Consumer Price Index (the "CPI"). These reviews were to take place during each January and July immediately preceding the March 1 or September 1 effective dates. The Respondents contend that no adjustment was due on September 1, 1982, since the collective bargaining agreements expired prior to the time the adjustment was to become effective.

The parties were unable to resolve their differences, especially with respect to the cost-of-living adjustment issue, and after the August 31 meeting the parties did not meet again until November 8, 1982. The parties met several more times during November and December but failed to reach an accord. Although several negotiating sessions did take place after August 31, the parties do not contest the fact that, if we find the Respondents to have bargained in accordance with the Act, a *bona fide* impasse was reached on that date.

Following the expiration of the collective bargaining agreements, the Respondents instituted several unilateral changes including alteration of vacation schedules and elimination of paid five-minute wash-up periods, certain Christmas bonuses, gifts and parties, and group insurance benefits for the dependents of employees. In addition, the Respondents never implemented the cost-of-living adjustment that the Union claims was due and payable. In December 1982, the Union filed unfair labor practice charges against the four Respondents individually. The four charges were consolidated and a hearing was held before an administrative law judge (the "ALJ") on June 28-30, 1983.

The ALJ ruled that the Respondents violated section 8(a)(5) and (1) of the Act by unlawfully making unilateral changes in wages and other terms and conditions of employment before a *bona fide* impasse had been reached and by, after pleading inability to pay, refusing to supply financial data requested by the Union. The ALJ determined that the cost-of-living adjustment had in fact accrued prior to the expiration of the collective bargaining agreements and that the adjustment was therefore a permissive subject of bargaining over which the Respondents could not lawfully bargain to an impasse. The ALJ also ruled that no *bona fide* impasse had been reached since the Respondent's bad faith refusal to supply financial information precluded their right to pronounce such an impasse.

The Board summarily affirmed the decision of the ALJ. Notably, however, the Board did not rely on the ALJ's conclusion with respect to the cost-of-living adjustment. Rather, the Board based its decision solely on the finding that the Respondents failed to bargain in good faith by refusing to disclose financial data after pleading inability to pay. (App. p. 3a to 5a)

Dissenting Judge Swygert found the following additional facts to be relevant:

The facts are crucial in cases which turn upon the inability-to-pay/refusal-to-pay distinction. The inquiry must always be whether, under the circumstances of the particular case, the statutory obligation to bargain in good faith has been met. *NLRB v. Truitt,* 351 U.S. 149, 153-54

(1956). It is not necessary that the claim of inability-to-pay be expressed with any particular magic words. *Atlanta Hilton & Tower,* 271 N.L.R.B. No. 214, sl. op. at 7, 117 L.R.R.M. 1224, 1226 (1984). The statements must be judged within the context of the bargaining setting: if an employer's refusal to meet a wage demand reasonably interpreted is the result of financial inability to meet the employees' demands rather than simply unwillingness to do so, the exact formulation used by the employer in conveying this message is immaterial. *Id.*

Duray Company concededly raised a plea of "poverty" to support its claim of economic necessity for its demands to scale down the wages and benefits to its unit employees. Respondents' "Answer to Consolidated Complaint, XII(c)," denying allegations "except that Respondent Duray pleaded inability to pay." The facts are not as clear cut with respect to Harvstone, American, and House-O-Lite. Ray Schoonhoven, representing the employers, "skillfully avoided using the precise word 'poverty,'" according to the administrative law judge. In fact, Schoonhoven explicitly asserted that the employers were "not pleading poverty." Tr. 235. When asked whether the companies were claiming that they would be forced out of business if the unions would not forego reductions in labor costs, Schoonhoven replied: "No. They might or they might not." Tr. 166, 267. Additionally, Schoonhoven referred to the "business judgment" of the companies to seek relief, Tr. 165, 235, and the need to be "more closely aligned" with competitors' labor costs "to be competitive." Tr. 166, 169, 235-36.

Schoonhoven, however, did not make only these "meeting competition" or "would not pay" assertions. He coupled those statements with operating-loss/going-out-of-business assertions that amounted to "could not pay." The majority dismisses the Board's compilation of these "smattering of words and phrases" as being "out of context," and holds that the assertions never implied financial inability to meet the employees' demands (*see infra* at 10). I believe that the effect of all the statements taken as a whole and within the entire bargaining context could lead the union rationally to conclude that the

companies were claiming financial inability to meet the union's demands.

First of all, it is undisputed that at the August 31, 1982 session, Schoonhoven stated that Duray Company was "losing money and had lost $92,000 during the past six months." Tr. 233, Schoonhoven; Tr. 320, Solomon, American Company; Tr. 326, Mayer, Duray Company. On this basis, the majority enforces the Board's order against Duray Company. But the majority does not believe that this clear assertion of a plea of poverty with respect to one employer is relevant to the position taken by the other three. Instead, it argues that Duray Company's financial condition is not attributable to the other three companies because there was "never any confusion among the parties as to which company was losing money." Although negotiations were conducted jointly, the majority states, the parties understood that each company was ultimately an independent entity seeking its own contract with the union. Therefore, under this view, Duray Company's disclosure of its financial posture is irrelevant to the status of the other three.

I cannot agree that the plea of poverty by Duray Company is irrelevant to the position of the remaining companies. The companies had traditionally bargained separately with the union, but signed essentially identical contracts. During the negotiations for a contract to replace the one expiring in August 1982, the four employers were represented by the same attorney. Although each bargaining session was theoretically limited to a particular employer, the four employers and the union all treated the discussions at each bargaining session as relating to all four companies.

There was no attempt by Schoonhoven to separate the effect of the announcement that one company was losing money from the message he was conveying regarding the other three companies. Schoonhoven testified that he followed his reference to Duray Company's $92,000 loss with a "long discussion about competitiveness and if you don't make a profit, you can't be in business." Tr. 279. Schoonhoven explicitly stated that "one company was losing money and the rest might." Tr. 160, Moreland.

The majority characterizes these statements by Schoonhoven as mere "truisms." It states that the plea of poverty by Duray Company was irrelevant with respect to the other three employers represented at the August 31, 1982 bargaining session. Instead, I believe that Schoonhoven effectively coupled his "can't pay" assertion with other "won't pay" assertions to create a reasonable concern by the union that the employers *as a group* were raising financial inability to meet bargaining demands.

This same message was effectively conveyed to the union at other bargaining sessions. For example, Schoonhoven later asserted that "relief on labor costs" because of "poor competitive positions" was essential for the companies to "stay in business, [otherwise] no one will have jobs." Stipulation signed June 28, 1983, p. 13. He also stated that the companies "need economic relief," Tr. 98, Lane, and that if economic concessions demanded by the companies were not met by the union, the companies "could, but ... not necessarily would ... go out of business." Tr. 101, Lane, December 21, 1982 bargaining session.

Immediately before negotiations commenced, two employers sent letters directly to their employees asserting that the wages paid them were higher than those of their competitors, and warning that "if we are going to continue in the Chicago area as a strong competing employer ... we must have a relief from this intolerable situation." The letters, drafted by Schoonhoven, also stated that "your future as well as the Company's will be vitally affected by these negotiations." Tr. 194, Joint Exhibits 18(a) and 18(b).[2]

---

[2] During the November 24, 1982 bargaining session, the respondent employers for the first time proposed a change in the management rights clause, Article III, to the effect that the employers retained "the right to shut down or relocate the plant in whole or part and to select the site of any such relocation." Joint Exhibits 15(a)-(d). On the heels of the letters and the bargaining statements, this proposed change in language also could have rationally fueled union fears that the employers as a group were losing money and pleading inability to pay.

> Based on this documentary evidence, stipulations, and testimony, the Board concluded that although Schoonhoven had skillfully avoided using the "talismanic" word "poverty," he had triggered the requirement of fair substantiation during the collective bargaining sessions with respect to all the employers. I do believe that the Board's conclusion is supported by substantial evidence. The statements must be judged in the context of the bargaining setting, taken as a whole. Moreover, we should give weight to the administrative law judge's appraisal of the testimony he heard and appreciate his superior vantage point in gauging the demeanor of the witnesses.
>
> I further believe that today's holding frustrates the statutory policy requiring substantiation of bargaining positions where necessary to allow peaceful, successful, collective bargaining. We condone the stratagem of maintaining a position during the bargaining and then denying such a position is in fact being taken when the opposing party demands substantiation. Such "gamesmanship" is, in my view, encouraged by the majority's opinion. I respectfully dissent.
>
> (App. p. 22a to 26a)

REASONS FOR GRANTING WRIT OF CERTIORARI

"The Wagner Act provided: "The findings of the Board as to the facts, if supported by evidence, shall be conclusive." Act of July 5, 1935, § 10(e), 49 Stat. 449, 454, 29 U.S.C. § 160(e), 29 U.S.C.A. § 160 (e)."
(*Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, at 477)

Certiorari should be granted here because:

1) The Decision of the Seventh Circuit creates a direct conflict with the Decision of the District of Columbia Circuit in *Meilman Food Industries, Inc.* v. *NLRB,* 593 F.2d 1371, which enforced the NLRB Decision, that the employer had not bargained in good faith when it refused to pay the vested cost-of-living increase that had been calculated during the life of the Collective Bargaining Agreement.

2) The Seventh Circuit Decision is contrary to this Court's holding in *NLRB* v. *Truitt, supra,* that employers have the duty to substantiate their claimed inability to pay wage rates, with supporting evidence, in order to meet their duty to bargain in good faith.

I

The majority portion of the Seventh Circuit's Decision is nodding reference to the criteria for judicial review of NLRB Decisions, as set forth by this Court in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, App. pp. 6a-7a. However, the majority then proceeds to misapply both the facts of the case and the existing legal precedents from the NLRB and the D. C. Circuit.

The majority correctly notes that the employer's unilateral refusal to implement the previously agreed to cost-of-living increase involved contract interpretation, App. p. 17a. Thereafter, the majority reaches a conclusion that the contract language applicable, *supra,* provided for payment of the cost-of-living increase on September 1, 1982, when the language clearly states that payment is due on the Monday of the week in which September 1 falls.

The majority reached its conclusion that the COLA is not payable during the term of the Collective Bargaining Agreement because it distinguished between the effective date of the payment of the increase and the review date, or date on which the increase was calculated. This distinction is insufficient because the employees were entitled to the COLA increase once the Consumer Price Index calculation was made, and the later payment did not, and could not, remove their right to this money as part of the third year of the existing Collective Bargaining Agreement. The above quoted language of the Agreement states this in clear and unequivocal terms and is not at variance with the Contract Language of the NLRB's *Meil-*

man Decision, 234 NLRB 698 (1978), enforced without opinion, 593 F2 1371 (D.C. Cir. 1979).

However, the majority failed to comment upon the distinction made by the Administration Law Judge and argued by the Union in its Brief to the NLRB and the Seventh Circuit. The Judge distinguished between the COLA provisions negotiated in 1979, which clearly provided for a third year increase that was to be an Amendment to the third year wage rate, from the employers' bargaining over the continuation of the COLA provision and its effectiveness in the next succeeding Collective Bargaining Agreement. (App. p. 41a)

An essential part of the Judge's conclusion that the four employers failed to bargain in good faith with the Union, was the finding that the incorporation of the COLA increase into the third year wage rate, made it a part of the then existing Collective Bargaining Agreement. (App. p. 43a) Therefore it was a permissible, rather than a mandatory, subject of bargaining between the parties over the terms of the new Collective Bargaining Agreement. The Judge found that the employers' conditioning any further bargaining upon the Union's agreement to cancel the second part of the third year's cost-of-living increase, was a violation of the principle that an employer cannot unilaterally change the wage structure in the course of Collective Bargaining. (App. p. 45a)

The Administrative Law Judge concluded that the employers could not bargain to impasse on August 31, 1982 because they were arguing a position that the NLRB had previously found to be legally unacceptable in the *Meilman* case, *supra,* and *Struther Wells* case 262 NLRB 1080 (1982) modified 721 F2 465 (CA3, 1983). The Judge's conclusion as to this regard is well founded as seen by the quote from the Board in the *Meilman* case, as follows:

> "We find, in agreement with the Administrative Law Judge, that the Respondent violated Section 8(a)(1) and (5) of the Act when it refused to pay the cost-of-living

> increase effective the first pay period after January 1, 1975. In doing so, however, we rely on the fact that the cost-of-living clause in the collective-bargaining agreement is clear on its face and requires no construction or interpretation beyond its plain meaning. The pertinent part of article 8.02 reads as follows: 'If as of any May 15 or November 15 of any year *during the life of this agreement* the Consumer Price Index . . . is at a level higher than 162.1, then effective with the first pay period beginning on or after the following July 1 or January 1. . . .' (Emphasis supplied.) Clearly, as long as the May 15 or November 15 date falls within the life of the agreement, and as long as the cost-of-living level reaches or exceeds 162.1, then the cost-of-living raise was payable on January 1, 1975. The Respondent's refusal to effectuate that increase on January 1, 1975, was a unilateral change in the existing wage structure in violation of Section 8(a)(1) and (5) of the Act, as found by the Administrative Law Judge." (Footnotes omitted) (emphasis in original) 234 NLRB at 698.

This conclusion of the Board, that the calculation of the COLA was the critical part of the equation to give the employees the increased wage rate was clearly stated by the Third Circuit in *Struther Wells supra.* Although the Court refused to enforce that part of the Board Order, it did so specifically because in the *Struthers Wells* case both the calculation period and the payment date occurred following the nominal expiration date of the Collective Bargaining Agreement. This is contrasted with the *Meilman* case where the calculation period occurred during the term of the Agreement and only the payment date occurred after its expiration. The Court language appears at Page 472 as follows:

> ". . . . In *Meilman Food Industries, Inc.*, 234 N.L.R.B. 698 (1978), the Board held that the refusal to pay *a COLA after the expiration of a collective bargaining agreement,* where the *adjustment is to be calculated as* of a *date prior* to *the expiration of the agreement, is a unilateral change in the existing wage structure and a violation of* § 8(a)(1) and (5) of the Act. The Board further held that there is *no violation* of the Act for a *unilateral change* where the

calculation date occurs *after the expiration* of the agreement. *Meilman,* 234 N.L.R.B. at 698 n.2." (Emphasis Supplied)

It is submitted by the Petitioners that the majority's comment that the *Struther Wells* citation is inappropriate, as based upon its failure to appreciate the basis on which the Board and the D. C. Circuit found the employer guilty of bad faith bargaining in the *Meilman* case.

The Union further submits that the majority conclusion that there is a distinction between the facts of the *Meilman* Decision and the instant case is without foundation. The above quoted portion of the Board Decision in *Meilman* clearly shows that the calculation date fell within the terms of the Agreement, and only the payment date occurred following the expiration of the Agreement. In the instant case both the calculation date, which was based on the July CPI, and the payment, which was the Monday of the week in which September 1st occurred, were within the terms of the Agreement. Thus the COLA provisions of the instant case are more clearly within the rationale expressed by the Board in that both the calculation and the payment dates are within the terms of the Agreement.

However, even assuming that the majority were correct that the payment date, or as it's called the effective date, fell on September 1 rather than August 30 of 1982, then these facts are exactly the same as in the *Meilman* case. Therefore, the Court would have to specifically disavow the rationale of the Board and the D.C. Circuit, rather than attempt to distinguish the facts of the instant case from that case in order to logically conclude that the employers' refusal to pay the 1982 COLA was not bad faith bargaining. This the Court majority did not do.

The necessary result of the majority conclusion that the employers could unilaterally refuse to pay the vested COLA increase during bargaining for a new Agreement, is to violate

the principles set forth by this Court in *NLRB* v. *Katz*, 369 U.S. 736 and *NLRB* v. *Crompton-Highland Mills*, 337 U.S. 217. If the opinion of the majority is allowed to stand, then the employers have no incentive to live up to their previously negotiated agreement, and the statutory requirement to bargain in good faith could be violated with impunity.

II

As with this Court's Decision in *Universal Camera Corp.*, v. *NLRB, supra*, the majority opinion gives reference to this Court's Decision in *NLRB* v. *Truitt Manufacturing Co.*, 351 U.S. 149. However, as is clearly noted in the dissent by Judge Swygert, the majority opinion ignores repeated statements by the employer's chief negotiator that lumped all four of the employers in the same condition of "poverty". App. pp. 21a to 26a.

The majority could not ignore the fact that one of the four employers, Duray Co., had admitted in its Answer to the NLRB Complaint that it had pleaded an inability to pay. Thus, the majority opinion concludes that Duray violated its duty to bargain by refusing to allow the Petitioner to view its books and records tc substantiate this claim of poverty. However, the majority opinion then improperly concludes that the employer's negotiator was not speaking for the other three employers, because each employer signed a separate, although identical, Agreement.

The error in this conclusion by the Court's majority is that it flies in the face of this Court's opinions in *Bonanno Linen Services* v. *NLRB*, 454 U.S. 404 and *NLRB* v. *Truck Drivers Union*, 353 U.S. 87 (*Buffalo Linen*). The effect of the majority conclusion that the three employers may be disassociated from the one employer, who had concededly pled an inability to pay, is to fragmentize the joint bargaining of the four employers, even though there was no prior contention by the employers that they were negotiating separately. The undermining of the

integrity of multi-employer bargaining, as articulated by this Court would result in chaos among employers and unions, as to what is the National Labor Policy in this regard.

Finally, the conclusion of dissenting Judge Swygert that the majority's holding results in frustration of the statutory policy that requires substantiation of bargaining positions, particularly where pleas of inability to pay are raised, is both valid and persuasive. This Court should not allow the majority opinion to stand, because it would necessarily result in the "gamesmenship" that would be fostered among many employers in their Collective Bargaining.

CONCLUSION

WHEREFORE, for the above and foregoing reasons, Petitioner respectfully prays that this Honorable Court issue its writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 84-3116

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

HARVSTONE MANUFACTURING CORP.,
DURAY FLUORESCENT MANUFACTURING CO.,
AMERICAN FLUORESCENT CORP. and
HOUSE-O-LITE CORP.,

Respondents.

Petition for Enforcement of an Order of the
National Labor Relations Board

ARGUED SEPTEMBER 10, 1985—DECIDED MARCH 6, 1986

Before WOOD and ESCHBACH, *Circuit Judges*, and SWYGERT, *Senior Circuit Judge.*

WOOD, *Circuit Judge.* The National Labor Relations Board (the "Board") petitions this court for enforcement of its order against Harvstone Manufacturing Corp. ("Harvstone"), Duray Fluorescent Manufacturing Co. ("Duray"), American Fluorescent Corp. ("American") and House-O-Lite Corp. ("House-O-Lite") (collectively the "Respondents"). This action arises out of unfair labor practice charges filed against the Respondents by Local 134, International Brotherhood of Electrical Workers (the "Union").

The charges against the four Respondents were consolidated and, after a hearing, the Board ruled[1] that the Respondents had violated section 8(a)(5) and (1) of the National Labor Relations Act (the "Act"), as amended, 29 U.S.C. § 151, *et seq.*,[2] by bargaining in bad faith and by unilaterally changing various terms and conditions of employment prior to reaching a *bona fide* bargaining impasse. The Board's order was predicated on a finding that the Respondents had made a claim of "inability to pay" and failed, after appropriate Union request, to disclose financial data substantiating their claim. The Board determined that the Respondents' failure to disclose the requested financial records was itself bad faith bargaining that precluded the negotiating parties from reaching a *bona fide* impasse. By definition, therefore, the Respondents' unilateral changes in wages and other terms of employment were violative of the Act.

The primary issue before us, consequently, is whether there is substantial evidence in the record as a whole to support the Board's finding that the Respondents pleaded inability to pay. A tangential issue we must also decide is whether a cost-of-living adjustment in the collective bargaining agreements between the Union and the Respondents became effective and therefore due to be implemented prior to the expiration of the agreements. The Union argues that the adjustment had already accrued

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[1] The Board's decision and order are reported at 272 N.L.R.B. No. 144.

[2] In pertinent part the Act provides:

> (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

29 U.S.C. § 158(a)(1) and (5).

to the employees' benefit before the agreements expired and was therefore a permissive subject of bargaining over which a bargaining impasse could not lawfully be reached.

For the reasons stated below, we deny enforcement of the Board's order as it relates to Respondents Harvstone, American, and House-O-Lite and modify and enforce the order as it applies to Respondent Duray.

I.

The Respondents are all manufacturers of fluorescent lighting fixtures in the Chicago area. Since 1964 the Respondents have recognized, bargained with and individually executed several collective bargaining agreements with the Union. The last of these agreements were three-year pacts that expired on August 31, 1982. The unfair labor practice charges which are the subject of this action arose out of negotiations between the Respondents and the Union beginning in August 1982. During these negotiations, all four Respondents were represented by Ray J. Schoonhoven. Although theoretically each bargaining session was limited to negotiations regarding one particular employer, the parties recognized that the final agreements between the Union and each Respondent would be substantially identical.

The Respondents came to the bargaining table seeking concessions from the Union claiming that they were operating at a competitive disadvantage relative to their counterparts in other portions of the United States. To substantiate their claim, the Respondents prepared a schedule comparing the wages and benefits paid by several of their competitors, also represented by the International Brotherhood of Electrical Workers, with their own labor costs. This schedule, which was given to the Union, purported to show that the costs paid by these competing manufacturers were significantly less than those incurred by the Respondents.

Armed with these figures, the Respondents met with Union representatives during pre-negotiation sessions dur-

ing the spring and summer of 1982, and commenced actual negotiations toward new collective bargaining agreements on August 11 of that year. During these sessions, the Respondents proposed a reduction in wages, insurance and pension benefits, and the elimination of cost-of-living adjustment clauses. The Union, on the other hand, stated that it would make no concessions and, in fact, initially proposed a wage increase. Additionally, in response to the claims of competitive disadvantage, the Union sought the Respondents' financial records claiming that if the employers were predicating their bargaining stance on economic problems, they were required to produce substantiating data. The Respondents' only response was that they were not pleading inability to pay.

In total, the parties met eight times during August 1982, with the final session taking place on August 31, the day the collective bargaining agreements between the parties expired. Throughout these eight sessions, apart from the concessions the Respondents were seeking, another bone of contention was a cost-of-living adjustment which the Union claims accrued to the employees' benefit on August 30, 1982. The Respondents contend that the cost-of-living adjustment was not part of the expired collective bargaining agreements. During the life of the agreements, cost-of-living adjustments became effective each March 1 and September 1. The adjustments were based on reviews of the Bureau of Labor Statistics Consumer Price Index (the "CPI"). These reviews were to take place during each January and July immediately preceding the March 1 or September 1 effective dates. The Respondents contend that no adjustment was due on September 1, 1982, since the collective bargaining agreements expired prior to the time the adjustment was to become effective.

The parties were unable to resolve their differences, especially with respect to the cost-of-living adjustment issue, and after the August 31 meeting the parties did not meet again until November 8, 1982. The parties met several more times during November and December but

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failed to reach an accord. Although several negotiating sessions did take place after August 31, the parties do not contest the fact that, if we find the Respondents to have bargained in accordance with the Act, a *bona fide* impasse was reached on that date.

Following the expiration of the collective bargaining agreements, the Respondents instituted several unilateral changes including alteration of vacation schedules and elimination of paid five-minute wash-up periods, certain Christmas bonuses, gifts and parties, and group insurance benefits for the dependents of employees. In addition, the Respondents never implemented the cost-of-living adjustment that the Union claims was due and payable. In December 1982, the Union filed unfair labor practice charges against the four Respondents individually. The four charges were consolidated and a hearing was held before an administrative law judge (the "ALJ") on June 28-30, 1983.

The ALJ ruled that the Respondents violated section 8(a)(5) and (1) of the Act by unlawfully making unilateral changes in wages and other terms and conditions of employment before a *bona fide* impasse had been reached and by, after pleading inability to pay, refusing to supply financial data requested by the Union. The ALJ determined that the cost-of-living adjustment had in fact accrued prior to the expiration of the collective bargaining agreements and that the adjustment was therefore a permissive subject of bargaining over which the Respondents could not lawfully bargain to an impasse. The ALJ also ruled that no *bona fide* impasse had been reached since the Respondents' bad faith refusal to supply financial information precluded their right to pronounce such an impasse.

The Board summarily affirmed the decision of the ALJ. Notably, however, the Board did not rely on the ALJ's conclusion with respect to the cost-of-living adjustment. Rather, the Board based its decision solely on the finding that the Respondents failed to bargain in good faith by refusing to disclose financial data after pleading inability to pay.

The Board ordered the Respondents, among other things, to cease and desist from the unfair labor practices found, to reinstate the terms of employment unilaterally changed by the Respondents (including the cost-of-living adjustment),[3] to compensate the employees for losses sustained as a result of the unilateral changes, to make the Respondents' financial records available to the Union and to bargain in good faith with the Union upon its request. The Board now petitions this court for enforcement of its order. The Union has intervened in these proceedings contending that the Board should have also affirmed the ALJ's finding that the cost-of-living adjustment was a permissive subject of bargaining over which the parties could not lawfully bargain to impasse.

II.

We acknowledge the maxim that a decision of the Board should not be set aside if it is supported by substantial evidence. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951); *NLRB v. Lewis University*, 765 F.2d 616, 620 (7th Cir. 1985); 29 U.S.C. § 160(f). Review of a Board decision requires that the court examine the entire record, "including the evidence opposed to the Board's view from which conflicting inferences reasonably could be drawn." *NLRB v. Adam and Eve Cosmetics, Inc.*, 567 F.2d 723, 727 (7th Cir. 1977). Although the entire record is examined, judicial review of Board action is still "quite limited." *International Union of Operating Engineers v. NLRB*, 755 F.2d 78, 81 (7th Cir. 1985). Even in those cases in which the reviewing court "would justifiably have made a different choice had the matter been before it *de novo*," the court is still obliged to uphold "the Board's choice be-

[3] The ALJ found that the Respondents' unilateral actions with respect to the Christmas bonuses, parties and gifts to be in violation of the Act. The Board, to the contrary, ruled that such items were gifts, rather than terms and conditions of employment, and consequently that the Respondents' unilateral changes were lawful. Since this issue is not raised here, we express no opinion regarding its resolution.

tween two fairly conflicting views . . . ." *Universal Camera*, 340 U.S. at 488. Nonetheless, and recognizing that the findings of the Board "are entitled to respect," *id.* at 490, this deference should never so blind the reviewing court that it becomes a mere rubber stamp substituting "judicial abdication for judicial review." *NLRB v. Truck Drivers, Oil Drivers, Etc.*, 630 F.2d 505, 507 (7th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981). *Accord Atlas Metal Parts Co. v. NLRB*, 660 F.2d 304, 308 (7th Cir. 1981). It is imperative that the reviewing court examine all of the evidence in context to ensure that the Board's findings fairly and accurately represent the picture painted by the record. With this in mind, we proceed to an examination of the Board's findings here.

It is well-established that when an employer makes a claim of financial inability to pay a proposed wage rate, it generally has an obligation, in order to meet its duty to bargain in good faith, to provide substantiating financial data to its employees' bargaining representative upon request. *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149, 153 (1956); *United Fire Proof Warehouse Co. v. NLRB*, 356 F.2d 494, 498 (7th Cir. 1966); *Craig and Hamilton Meat Co.*, 271 N.L.R.B. No. 135, 117 L.R.R.M. (BNA) 1210 (1984). "Although no magic words are required to express an inability to pay, the words and conduct must be specific enough to convey such a meaning." *Atlanta Hilton and Tower*, 271 N.L.R.B. No. 214, 117 L.R.R.M. (BNA) 1224, 1227 (1984). *Accord New York Printing Pressmen and Offset, Etc. v. NLRB*, 538 F.2d 496, 500 (2d Cir. 1976). As the Board acknowledged at oral argument, the mere assertion by an employer that it is operating at a competitive disadvantage does not, in and of itself, constitute a claim of inability to pay. *Empire Terminal Warehouse Co.*, 151 N.L.R.B. 1359, 1360 (1965), *enforced sub nom. Dallas General Drivers, W. and H., Local No. 745 v. NLRB*, 355 F.2d 842 (D.C. Cir. 1966); *Charles E. Honaker*, 147 N.L.R.B. 1184, 1187-88 (1964). The relevant test, as articulated by this court, is to ascertain whether the employer said it "would not" as opposed to

"could not" pay the employees' proposed demands.[4] *United Fire Proof*, 356 F.2d at 498. Only in the latter situation

[4] In several early decisions the Board had concluded that a claim of competitive disadvantage was itself a plea of inability to pay. *E.g.*, *Cincinnati Cordage and Paper Co.*, 141 N.L.R.B. 72, 77 (1963); *Peerless Distributing Co.*, 144 N.L.R.B. 1510, 1514 (1963) (ruling that employer's claim that it was not pleading inability to pay but was resisting union demands out of a desire to remain competitive is "self-contradictory"; "if granting economic benefits would . . . have the effect of reducing [the employer's] competitiveness, it follows that the [employer] was asserting its financial inability to grant economic benefits") (footnote omitted); *Stockton District Kidney Bean Growers, Inc.*, 165 N.L.R.B. 223, 224-25 (1967). As conceded during oral argument, the Board apparently no longer subscribes to such a stringent view. Indeed, this court has already rejected the Board's once-held notion that a claim of competitive disadvantage was ipso facto a claim of inability to pay. *United Fire Proof Warehouse Co. v. NLRB*, 356 F.2d 494 (7th Cir. 1966).

Two cases cited by the Board in its brief, *NLRB v. Celotex Corp.*, 364 F.2d 552 (5th Cir.), *cert. denied*, 385 U.S. 987 (1966) and *United Steelworkers of America, AFL-CIO, Local 5571 v. NLRB*, 401 F.2d 434 (D.C. Cir. 1968), *cert. denied sub nom. Stanley-Artex Windows v. NLRB*, 395 U.S. 946 (1969), *enforcing, Stanley Building Specialties Co.*, 166 N.L.R.B. 984 (1967), are not to the contrary. Although we acknowledge there is language in these opinions that could be construed as supporting the Board's position, we do not find the Board's reading of these decisions controlling here. In *Celotex*, for example, the court enforced a Board order finding that an employer had pleaded inability to pay when it insisted that concessions were necessary to make its "plant competitive *and to insure that plant's survival*," 552 F.2d at 553 (emphasis added), and not solely on the basis of a claim of competitive disadvantage. Indeed, the trial examiner found that the bargaining between the parties had taken place in the context of what wage rate the plant "*could* afford." *The Celotex Corp.*, 146 N.L.R.B. 48, 54 (1964) (emphasis added).

Similarly, in *United Steelworkers* (Burger, J.), the court, in enforcing a Board order finding that the employer had pleaded inability to pay, noted: "When the final wage offers were exchanged, the Company returned to its claim that the money to pay for the Union's proposal *just wasn't there*." 401 F.2d at 436 (footnote omitted) (emphasis added). Again, the issue apparently was not

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where the employer communicated that it "could not" pay the demands has it made a claim of inability to pay. *See New York Printing Pressman*, 538 F.2d at 500; *Atlanta Hilton*, 271 N.L.R.B. No. 214, 117 L.R.R.M. (BNA) at 1227. *See also NLRB v. Unoco Apparel, Inc.*, 508 F.2d 1368, 1370 (5th Cir. 1975) (holding that the employer's statement that the " 'employees came to the wrong well . . . the well is dry' " constituted a plea of inability to pay). We must therefore determine whether the four Respondents here, in asserting that they were in a competitive disadvantageous position, were claiming they "would not pay" or whether they "could not pay" for the contractual provisions proposed by the Union.

Resolving this issue with respect to Respondent Duray is relatively simple. Although counsel for the Respondents argued in its brief and during oral argument that Duray had made no claim of inability to pay, Duray in fact con-

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[4] *continued*
that the employer "would not" pay, but rather that the employer "could not" pay.

Interestingly enough, however, the Board contended during oral argument that the *United Steelworkers* case stood for the proposition that a claim of competitive disadvantage was necessarily a claim of inability to pay, even though just earlier in its argument the Board had conceded that this could not rationally be the case. Moreover, the Board overlooks *Dallas General Drivers, W. and H., Local Union No. 745 v. NLRB*, 355 F.2d 842 (D.C. Cir. 1966) (Burger, J.), that was decided by the same court that decided *United Steelworkers*. In *Dallas General*, in refusing to overturn a Board decision finding that an employer had not pleaded inability to pay, the court noted: "The Company's position on wages was not based on a claim of financial inability to pay but on the ground that it was paying rates in excess of prevailing rates of its competition in the same labor market." 355 F.2d at 845. In short, the court refused to find that a claim of competitive disadvantage was the equivalent of a plea of inability to pay. Since the *United Steelworkers* court does not overrule or even criticize the *Dallas General* decision, we must assume that *Dallas General* is still good law and consistent with the reading of *United Steelworkers* noted above.

cedes this point in its answer to the Board's complaint. *See* Answer to Consolidated Complaint XII(c). On this basis alone, we hold that there is substantial evidence to support the Board's finding that Respondent Duray pleaded inability to pay.

The question with respect to Respondents Harvstone, American and House-O-Lite cannot be disposed of as easily, however. In his opinion, which was summarily affirmed by the Board, the ALJ knitted together a smattering of words and phrases, and from this compilation derived his finding that the Respondents pleaded inability to pay. A review of the record as a whole leads us to conclude, however, that the ALJ took much of the testimony out of context and that in the proper perspective the three Respondents, in seeking concessions, had not claimed inability to pay. The Respondents' position throughout was that they needed the concessions to be competitive; they never implied that they were financially unable, as opposed to unwilling, to meet the Union's demands.

The ALJ correctly points out that the Respondents' bargaining representative, Ray Schoonhoven, had disclosed that Duray was losing money. However, we believe that Duray's financial condition is not attributable to the other three Respondents as a means of finding that they pleaded inability to pay. There was never any confusion among the parties as to which company was losing money. Moreover, although negotiations were conducted jointly, the parties understood that each Respondent was ultimately an independent entity seeking its own contract with the Union. Duray's disclosure of its financial posture in this context is therefore irrelevant to the status of the other three Respondents.[5]

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[5] In any event, the Board has held that simply because an employer acknowledges the incurrence of losses does not necessarily place it in the posture of having pleaded inability to pay. *Vore Cinema Corp.*, 254 N.L.R.B. 1288, 1292 (1981) (ruling that an employer's proposal to reduce employee earnings in light of em-

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The ALJ in his decision also relies heavily on statements made by Schoonhoven during the course of the negotiations. For example, on one occasion Schoonhoven noted that if the Respondents "don't make a reasonable profit so they can be a viable competitive business, they won't stay in business, and no one will have jobs." Statements such as this one are, however, nothing more than truisms. Clearly, if an employer operates at a competitive disadvantage for a long enough time, its profit margin, as a matter of pure economics, will decline eventually forcing it out of business. There would then come a time when these three companies could be expected to plead inability to pay, but that time has not yet arrived. In context Schoonhoven's statements did not constitute a plea of inability to pay. The relevant time period we must concern ourselves with is that of the term of the new collective bargaining agreement. It is quite conceivable that an employer, already operating at a competitive disadvantage with respect to employee compensation, could afford to pay increased wages during the course of a new agreement. While it is axiomatic that this scenario cannot be played out indefinitely, it does not preclude a finding that, at least for the term of the new collective bargaining agreement, the employer operating at a competitive disadvantage is financially able, although perhaps unwilling, to pay increased wages. In such a case, we think that the employer's claim of competitive disadvantage is not a plea of inability to pay.[6]

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[5] *continued*
ployer's comment that he had lost money in 1978 and did not intend to do so in 1979 and employer's statement that his final proposal was the "best offer he felt he could make" was not equivalent to a claim of inability to pay).

[6] To the extent that the foregoing is inconsistent with *Wheeling Pacific Co.*, 151 N.L.R.B. 1192, 1195 (1965) (ruling that the "basic principles which underlay *Truitt* cannot be considered less relevant merely because [the employer] may have expressed the view that wage increases would ultimately *lead to poverty*, rather than that such increases were precluded by *present* poverty") (emphasis

(Footnote continued on following page)

After reviewing the record, we find that this is precisely the situation here. Respondents Harvstone, American and House-O-Lite, although acknowledging in response to Union inquiries that they could lose money and eventually go out of business if their competitive position did not improve, never communicated to the Union that they were financially unable to pay the Union's proposed demands for the duration of the new agreements. Rather, the record indicates that the Respondents were simply unwilling to meet the Union's demands. In short, "[w]here the evidence disclosed 'won't', the Board found 'can't.' " *United Fire Proof*, 356 F.2d at 498. Accordingly, we hold that there is not substantial evidence to support the Board's conclusion that Harvstone, American and House-O-Lite bargained in bad faith by refusing to provide substantiating financial data after pleading inability to pay.

Respondent Duray, on the other hand, although conceding that it pleaded inability to pay, nonetheless contends that it too was under no obligation to disclose its financial records. Duray first argues that the Union's request for information was inadequate to give rise to its disclosure duty. Duray acknowledges that the Union did request to see financial documentation prior to the impasse that was reached on August 31. In fact, the parties stipulated that on August 26 the Union representative had asked the Respondents to "show us your books," and that the Respondents refused claiming that they were not "pleading poverty." Duray contends that since the Union's request was overly broad, was not zealously pursued and was not in writing that it was under no duty to disclose its financial records. We disagree.

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[8] *continued*
in original), we disagree with the Board's rationale in that case. Carried to its logical end, the Board's decision in *Wheeling* would transform any discussion by an employer of an unfavorable position vis-a-vis competitors into a plea of inability to pay. As even the Board concedes, this result stretches the logic of *Truitt* far beyond its rational limit. *See supra* p. 7.

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There is no requirement that a request for financial records to substantiate a plea of inability to pay be in writing. *International Telephone and Telegraph Corp. v. NLRB*, 382 F.2d 366, 371 (3d Cir. 1967), *cert. denied*, 389 U.S. 1039 (1968). Moreover, we find that the Union's request was not so overly broad or vague that Duray could not reasonably have responded to it. Indeed, in *NLRB v. Bagel Bakers Council of Greater New York*, 434 F.2d 884 (2d Cir. 1970), *cert. denied*, 402 U.S. 908 (1971), the court found the following almost identical request sufficient to give rise to a duty to disclose: " 'Bring your books to us. Bring an audit, accountant's report. Show us where you are losing money so we can guide ourselves and know in which direction we're going.' " 434 F.2d at 887. It is also clear from the record that Schoonhoven understood what the Union was seeking. He never once sought clarification regarding the Union's request; rather, his only response was that no plea of inability to pay had been made and that therefore no financial records would be forthcoming.[7] After reviewing the record, we conclude that Duray understood what financial information the Union was seeking and simply refused to disclose it; a more specific or detailed request would have been to no avail.

We also find no merit in Duray's argument that the Union's request was not made with sufficient zeal. The Union's zeal was minimal, but sufficient. Employees are not required to request the substantiating data on more than one occasion or hound the employer when the information is not produced. This is especially true where, as here, the employer fully understands that the employees are seeking substantiating documentation and yet simply refuses to deliver. Under these circumstances we find the Union's request of "show us your books" adequate to give rise to Duray's disclosure obligation.

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[7] The fact that Duray waited until after the unfair labor practice charges were filed to concede that it had pleaded inability to pay does not change our analysis. The simple fact is that Duray pleaded inability to pay and that it, given the proper request, was under an obligation to supply substantiating financial data.

Duray next argues that even if the Union's August 26 request was adequate, the Union waived the right to review the substantiating data on August 31. At the hearing, Schoonhoven admitted that he had stated at the August 31 meeting that Duray had lost $92,000 in the last six months and then had waved a document, which was purportedly Duray's profit and loss statement, in the air and asked if the Union wanted to see it. The Union's representative acknowledged, again according to Schoonhoven's testimony, that he would at some point want to see the document. From this, Duray concludes that the Union waived its right to review substantiating financial data. We find Duray's contention without merit.

Without "a clear and unmistakable showing of a waiver" we are reluctant to deprive the Union of its right to examine Duray's financial records. *Tide Water Associated Oil Co.*, 85 N.L.R.B. 1096, 1098 (1949). *Accord Tucker Steel Corp., and Steel Supply Co.*, 134 N.L.R.B. 323, 332 (1961). There is no indication that the Union's representative even contemplated the possibility that his statement would be construed as a waiver of the Union's rights. Schoonhoven concedes, moreover, that he waved the profit and loss statement in the air merely as an "aside." Viewed in this context, the Union's conduct did not come close to constituting a "clear and unmistakable" waiver of its rights.

Nor did the Union's conduct serve to rescind its request for substantiating data. Duray argues that the August 26 request was at the very least nullified by the Union's refusal to examine the proffered data on August 31, and that after August 31 Duray was under no obligation to provide data absent a new request by the Union. We disagree. Duray, by its own admission, did not present the profit and loss statement to the Union in fulfillment of its disclosure obligation. Indeed, Schoonhoven contended throughout that he refused to disclose any financial data because there had been no plea of inability to pay. Simply because Duray later conceded that it had pleaded inability does not alter the fact it refused to disclose financial data

not because the Union's request had been withdrawn, but because at the time Duray was contending that it had not pleaded inability to pay. Moreover, Duray produced no evidence establishing that the Union considered its request for information withdrawn. Under these circumstances, we find that the Union's August 26 request was not rescinded by its actions on August 31.

Even if this were not true, Duray's rescission argument still lacks merit. Although Duray seeks to exonerate itself with this argument for the actions it took after August 31, Duray still remains unable to explain its refusal to supply the requested data between August 26 and August 31. The simple truth is that during this time the Union made the necessary request for substantiating data and Duray, in violation of the Act, refused to deliver.

Duray's next contention is that even if the Union properly requested information, its refusal to supply such data is not *per se* bad faith bargaining. Although there is language in the Supreme Court's decision in *Truitt* that might support Duray's position,[8] the general consensus today is that "for all practical purposes" a refusal to disclose alone constitutes a failure to bargain in good faith.[9]

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[8] In limiting its decision in *Truitt*, the Court noted:

> We do not hold, however, that in every case in which economic inability is raised as an argument against increased wages it automatically follows that the employees are entitled to substantiating evidence. Each case must turn upon its particular facts. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met.

351 U.S. at 153-54 (footnote omitted).

[9] Our decision in *J. I. Case Co. v. NLRB*, 253 F.2d 149 (7th Cir. 1958), is not to the contrary. In *J. I. Case* we simply noted that a union has, absent a showing of relevance, no " 'per se' right to information" it requests from an employer during the course of collective bargaining. *Id.* at 154-55. In the instant case, no question has been raised regarding the relevance of Duray's financial records. Indeed, since Duray conceded inability to pay, we may assume, absent a showing otherwise, that such records which substantiate its claim are relevant and should be disclosed.

Teleprompter Corp. v. NLRB, 570 F.2d 4, 9 n.2 (1st Cir. 1977) (*citing, inter alia, C-B Buick v. NLRB*, 506 F.2d 1086, 1091 (3d Cir. 1974); *NLRB v. Bagel Bakers Council*, 434 F.2d at 888; *NLRB v. Southland Cork Co.*, 342 F.2d 702, 706 (4th Cir. 1965)). Even if this is not the case, Duray advances no additional circumstances that would justify our classifying its refusal as other than bad faith bargaining. *Cf. Western Massachusetts Electric Co. v. NLRB*, 589 F.2d 42, 47 (1st Cir. 1978). Accordingly, we hold that there is substantial evidence to support the Board's conclusion that Duray violated section 8(a)(5) and (1) of the Act by refusing to disclose its financial records.[10]

The final issue we consider is whether a cost-of-living adjustment accrued to the benefit of the Respondents' employees prior to the expiration of their bargaining agreements with the Union. The Union contends that the adjustment had accrued prior to the expiration of the agreements and that it was therefore a permissive subject of bargaining over which the parties could not bargain to impasse. The Union argues that the Respondents violated the Act by insisting on the elimination of this adjustment.

Before reaching the merits of the Union's argument, we must first acknowledge the Respondents' contention that the Union is not properly before this court. The Respondents argue that the Board's order gives the Union all of the relief it sought, even though the Board did not rely on the ALJ's finding that the cost-of-living adjustment accrued prior to August 31, 1982. The Respondents rely on section 10(f) of the Act which provides that only those persons "aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may

[10] Duray was not relieved of its obligation to disclose substantiating data by the Union's failure to bargain in good faith. Although Duray argues to the contrary, there is no evidence in the record indicating that the Union failed to engage in good faith bargaining as required by the Act.

obtain a review of such order . . . ." 29 U.S.C. § 160(f). The Respondents contend that since the Union received all the relief it sought it is not an "aggrieved" party and should not be allowed to intervene in this proceeding. The Respondents fail, however, to distinguish between the right to *petition* for review and the right to *intervene* in ongoing proceedings. By its own terms, section 10(f) governs only the right to petition this court for review; it is silent as to a party's right to intervene after a petition for review is filed. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Scofield*, 382 U.S. 205, 209 (1965). Contrary to the Respondents' position, the Supreme Court has held that a successful charging party, in this case the Union, has the right to intervene in proceedings either reviewing or enforcing an order of the Board. *Id.* at 208. There is no requirement that the intervening party be "aggrieved" as that term is used in section 10(f). In short, the Union "should not be prejudiced by [its] success before the agency." *Id.* at 222. We therefore hold that the Union is a proper party and is free to raise the cost-of-living adjustment issue in this proceeding.

Intrinsically, the adjustment issue itself involves nothing more than a debate over contractual interpretation. The collective bargaining agreements, which expired on August 31, 1982, provided that cost-of-living adjustments would be effective on each March 1 and September 1 during the life of the agreements. The amount of each adjustment was to be calculated based on changes in the CPI. The relevant review date of the CPI for the March 1 adjustment was the preceding January and the review date for the September 1 adjustment was the preceding July. The debate centers around whether the Respondents were obligated to make an adjustment effective September 1, 1982, even though the agreements between the parties expired on August 31, 1982.

The Union, arguing that the relevant point of reference is the July 1982 review date, maintains that since the changes in the CPI took place during the life of the agree-

ments, that the parties must have intended the adjustment to reflect these changes even though the actual adjustment was not effective until after the agreements expired. In support of its proposition the Union cites *Meilman Food Industries, Inc.*, 234 N.L.R.B. 698 (1978), *enforced without opinion*, 593 F.2d 1371 (D.C. Cir. 1979).[11] In *Meilman*, the Board ruled that a cost-of-living adjustment had accrued to the employees' benefit even though its effective date fell after the expiration of the collective bargaining agreement. In so doing, however, the Board relied explicitly on the fact that the agreement clearly established that the relevant time for determining when the adjustment had accrued was the review date, which fell during the life of the agreement. 234 N.L.R.B. at 698, 704. Basing its decision on the specific language of the agreement, which "is clear on its face and requires no construction or interpretation beyond its plain meaning," the Board held that the adjustment was due and payable even though the effective date fell outside of the life of the agreement. *Id.*

Although the Union contends otherwise, the instant case differs from *Meilman*. The Union's agreements with the Respondents did not place importance on the review dates for determining when the cost-of-living adjustments actually accrued. Our reading of these agreements leads us to conclude that the January and July review dates were merely points of reference from which the amount of the adjustments was to be ascertained. There is no language in the agreements establishing the review dates as the

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[11] The Union's reliance on *Struthers Wells Corp.*, 262 N.L.R.B. 1080 (1982), *modified*, 721 F.2d 465 (3d Cir. 1983), is inapposite. In *Struthers* the court held that an employer did not violate the Act by refusing to grant a cost-of-living adjustment where both the review and effective dates were beyond the term of the collective bargaining agreement. *Id.* at 472. The court expressed no opinion as to the vitality of *Meilman* in the Third Circuit other than to note that *Meilman* was distinguishable from the case before it.

time at which the cost-of-living adjustments became contractually enforceable rights in the hands of the employees. Indeed, unlike *Meilman* in which the review dates were definitively established as being each May 15 and November 15, the review dates in the Respondents' agreements were to occur sometime following the publication of the CPI for the appropriate January or July. This lack of any established date for such review is further evidence that the review dates have no significance in determining the Respondents' obligations to pay cost-of-living adjustments. We therefore find that the Respondents' contractual duty to pay such adjustments arose, and the employees' rights to such adjustments accrued, only on the effective dates during the life of the agreements. Since the September 1, 1982, effective date occurred after the expiration of the collective bargaining agreements, the Respondents were not obligated to pay the adjustment in question.

Even conceding the above, the Union nonetheless contends that the adjustment actually became payable to the employees on August 30, 1982, just prior to the expiration of the agreements. To support its assertion, the Union relies on language contained in Art. XIX, § 4 of the agreements that mandated that the adjustment be paid beginning "on the first day of the pay week nearest the date on which the increase becomes due." The Union contends that since September 1, 1982, was a Wednesday that the adjustment, in accordance with the agreements, became payable to the employees on Monday, August 30. This argument, however, puts the cart before the horse. Pursuant to the agreements themselves, the adjustment was due on the first day of the week in which it became effective. What the Union's argument overlooks is that the adjustment in question here *never* became effective. Since no adjustment was due on September 1, the employees were not entitled to any increase on August 30. The Respondents did not violate the Act or their agreements by bargaining to an impasse over the cost-of-living adjustment.

III.

We hold that the Board's finding that Respondents Harvstone, American and House-O-Lite violated section 8(a)(5) and (1) of the Act by refusing to disclose financial records after pleading inability to pay is not supported by substantial evidence. Furthermore, we find that all four Respondents did not violate the Act by bargaining to an impasse over the elimination of the cost-of-living adjustment. The unilateral changes in mandatory subjects of bargaining made by Harvstone, American and House-O-Lite, therefore, occurred after a *bona fide* impasse had been reached and were lawful under the Act. *See NLRB v. Katz*, 369 U.S. 736, 747-48 (1962); *Atlas Metal Parts*, 660 F.2d at 309. Enforcement of the Board's order as it relates to Respondents Harvstone, American and House-O-Lite is accordingly denied.

With respect to Respondent Duray, we hold that there is substantial evidence to support the Board's finding that Duray pleaded inability to pay and thereafter refused, in violation of the Act, to provide substantiating financial data. The unilateral changes implemented by Duray were consequently made, also in contravention of the Act, prior to reaching a *bona fide* bargaining impasse. We therefore grant enforcement of the Board's order as it relates to Respondent Duray except insofar as it mandates the implementation of the September 1 cost-of-living adjustment. The Board's order, predicated on the erroneous conclusion that the adjustment accrued on August 30, 1982, requires Duray to make its employees "whole" by implementing the adjustment with interest. Since we find that the cost-of-living adjustment never accrued to Duray's employees, we deny enforcement of the Board's order as it relates to this adjustment.[12]

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[12] We are mindful of the fact that under the Act "an expired collective bargaining agreement continues to define the status quo as to wages and working conditions," and that this status quo must be maintained until a new agreement is reached or the parties

(Footnote continued on following page)

No. 84-3116

Enforcement denied as to Respondents Harvstone, American and House-O-Lite. The Board's order as to Respondent Duray is modified and enforced.

SWYGERT, *Senior Circuit Judge*, concurring in part and dissenting in part. I concur with the enforcement of the Board's order as it applies to the Duray Company. I must, however, dissent from the denial of enforcement against Harvstone Manufacturing Company, American, and House-O-Lite.

The issue before us, as the majority states, is whether there is substantial evidence in the record as a whole to support the Board's findings. This case involves a difficult factual situation for the court to review. As Justice Burger, then Circuit Judge, said in *Dallas General Drivers, W & H Local No. 745 v. NLRB*, 355 F.2d 842, 844-45 (D.C. Cir. 1966), in the whole complex of industrial relations there are few issues less suited to appellate judicial appraisal than evaluation of bargaining processes or better suited to the expert experience of a Board which deals constantly with such problems. In the instant case, the administrative law judge and the Board had to draw inferences from a variety of verbal statements and documentary assertions made in the context of bargaining. Although the facts make this a fairly close case, I believe that the judge and the Board drew reasonable inferences which should not be disturbed by an appellate court.

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[12] *continued*

negotiate in good faith to an impasse. *NLRB v. Cauthorne*, 691 F.2d 1023, 1025 (D.C. Cir. 1982) (*citing NLRB v. Carilli*, 648 F.2d 1206, 1214 (9th Cir. 1981)). In Duray's case, the status quo is defined as of August 31, 1982, when its collective bargaining agreement expired. Since no cost-of-living adjustment was due on that date, Duray will not be obligated to implement one after it resumes negotiations with the Union pursuant to the Board's order.

The distinction which the Board had to make was a fine one: Did the employers make a claim of financial inability to pay a proposed wage rate? (If so, the employers potentially triggered an obligation on their part to provide substantiating financial data to their employees' bargaining representative. The disclosure is required to the extent necessary to permit a union to make a meaningful evaluation of the claim of financial inability. *Teleprompter Corp. v. NLRB*, 570 F.2d 4, 10 (1st Cir. 1977).) Or, did the employers indicate that they "would not" as opposed to "could not" pay the employees' proposed demands? (The Board recognized in *United Fire Proof Warehouse Co. v. NLRB*, 356 F.2d 494, 498 (7th Cir. 1966), that such meeting-competition assertions are not necessarily the equivalent of inability-to-pay assertions and may not trigger an obligation to disclose. *Empire Terminal Warehouse Co.*, 151 N.L.R.B. 1359, 1360 (1965), *enf'd*, 355 F.2d 842 (D.C. Cir. 1966); *Charles E. Honaker*, 147 N.L.R.B. 1184, 1187-88 (1964).)

The facts are crucial in cases which turn upon the inability-to-pay/refusal-to-pay distinction. The inquiry must always be whether, under the circumstances of the particular case, the statutory obligation to bargain in good faith has been met. *NLRB v. Truitt*, 351 U.S. 149, 153-54 (1956). It is not necessary that the claim of inability-to-pay be expressed with any particular magic words. *Atlanta Hilton & Tower*, 271 N.L.R.B. No. 214, sl. op. at 7, 117 L.R.R.M. 1224, 1226 (1984). The statements must be judged within the context of the bargaining setting: if an employer's refusal to meet a wage demand reasonably interpreted is the result of financial inability to meet the employees' demands rather than simply unwillingness to do so, the exact formulation used by the employer in conveying this message is immaterial. *Id.*

Duray Company concededly raised a plea of "poverty" to support its claim of economic necessity for its demands to scale down the wages and benefits to its unit employees. Respondents' "Answer to Consolidated Complaint, XII(c)," denying allegations "except that Respondent

No. 84-3116

Duray pleaded inability to pay." The facts are not as clear cut with respect to Harvstone, American, and House-O-Lite. Ray Schoonhoven, representing the employers, "skillfully avoided using the precise word 'poverty,'" according to the administrative law judge. In fact, Schoonhoven explicitly asserted that the employers were "not pleading poverty." Tr. 235. When asked whether the companies were claiming that they would be forced out of business if the unions would not forego reductions in labor costs, Schoonhoven replied: "No. They might or they might not." Tr. 166, 267. Additionally, Schoonhoven referred to the "business judgment" of the companies to seek relief, Tr. 165, 235, and the need to be "more closely aligned" with competitors' labor costs "to be competitive." Tr. 166, 169, 235-36.

Schoonhoven, however, did not make only these "meeting competition" or "would not pay" assertions. He coupled those statements with operating-loss/going-out-of-business assertions that amounted to "could not pay." The majority dismisses the Board's compilation of these "smattering of words and phrases" as being "out of context," and holds that the assertions never implied financial inability to meet the employees' demands (*see infra* at 10). I believe that the effect of all the statements taken as a whole and within the entire bargaining context could lead the union rationally to conclude that the companies were claiming financial inability to meet the union's demands.

First of all, it is undisputed that at the August 31, 1982 session, Schoonhoven stated that Duray Company was "losing money and had lost $92,000 during the past six months." Tr. 233, Schoonhoven; Tr. 320, Solomon, American Company; Tr. 326, Mayer, Duray Company. On this basis, the majority enforces the Board's order against Duray Company. But the majority does not believe that this clear assertion of a plea of poverty with respect to one employer is relevant to the position taken by the other three. Instead, it argues that Duray Company's financial condition is not attributable to the other three companies because there was "never any confusion among

the parties as to which company was losing money." Although negotiations were conducted jointly, the majority states, the parties understood that each company was ultimately an independent entity seeking its own contract with the union. Therefore, under this view, Duray Company's disclosure of its financial posture is irrelevant to the status of the other three.

I cannot agree that the plea of poverty by Duray Company is irrelevant to the position of the remaining companies. The companies had traditionally bargained separately with the union, but signed essentially identical contracts. During the negotiations for a contract to replace the one expiring in August 1982, the four employers were represented by the same attorney. Although each bargaining session was theoretically limited to a particular employer, the four employers and the union all treated the discussions at each bargaining session as relating to all four companies.

There was no attempt by Schoonhoven to separate the effect of the announcement that one company was losing money from the message he was conveying regarding the other three companies. Schoonhoven testified that he followed his reference to Duray Company's $92,000 loss with a "long discussion about competitiveness and if you don't make a profit, you can't be in business." Tr. 279. Schoonhoven explicitly stated that "one company was losing money and the rest might." Tr. 160, Moreland.

The majority characterizes these statements by Schoonhoven as mere "truisms." It states that the plea of poverty by Duray Company was irrelevant with respect to the other three employers represented at the August 31, 1982 bargaining session. Instead, I believe that Schoonhoven effectively coupled his "can't pay" assertion with other "won't pay" assertions to create a reasonable concern by the union that the employers *as a group* were raising financial inability to meet bargaining demands.

This same message was effectively conveyed to the union at other bargaining sessions. For example, Schoon-

hoven later asserted that "relief on labor costs" because of "poor competitive positions" was essential for the companies to "stay in business, [otherwise] no one will have jobs." Stipulation signed June 28, 1983, p. 13. He also stated that the companies "need economic relief," Tr. 98, Lane, and that if economic concessions demanded by the companies were not met by the union, the companies "could, but . . . not necessarily would . . . go out of business." Tr. 101, Lane, December 21, 1982 bargaining session.

Immediately before negotiations commenced, two employers sent letters directly to their employees asserting that the wages paid them were higher than those of their competitors, and warning that "if we are going to continue in the Chicago area as a strong competing employer . . . we must have a relief from this intolerable situation." The letters, drafted by Schoonhoven, also stated that "your future as well as the Company's will be vitally affected by these negotiations." Tr. 194, Joint Exhibits 18(a) and 18(b).*

Based on this documentary evidence, stipulations, and testimony, the Board concluded that although Schoonhoven had skillfully avoided using the "talismanic" word "poverty," he had triggered the requirement of fair substantiation during the collective bargaining sessions with respect to all the employers. I do believe that the Board's conclusion is supported by substantial evidence. The statements must be judged in the context of the bargaining setting, taken as a whole. Moreover, we should give

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* During the November 24, 1982 bargaining session, the respondent employers for the first time proposed a change in the management rights clause, Article III, to the effect that the employers retained "the right to shut down or relocate the plant in whole or part and to select the site of any such relocation." Joint Exhibits 15(a)-(d). On the heels of the letters and the bargaining statements, this proposed change in language also could have rationally fueled union fears that the employers as a group were losing money and pleading inability to pay.

weight to the administrative law judge's appraisal of the testimony he heard and appreciate his superior vantage point in gauging the demeanor of the witnesses.

I further believe that today's holding frustrates the statutory policy requiring substantiation of bargaining positions where necessary to allow peaceful, successful, collective bargaining. We condone the stratagem of maintaining a position during the bargaining and then denying such a position is in fact being taken when the opposing party demands substantiation. Such "gamesmanship" is, in my view, encouraged by the majority's opinion. I respectfully dissent.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 10, 1986.

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. JESSE E. ESCHBACH, Circuit Judge*
Hon. LUTHER M. SWYGERT, Senior Circuit Judge

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

No. 84-3116 *vs.*

HARVSTONE MANUFACTURING CORP., DURAY FLUORESCENT MANUFACTURING CO., AMERICAN FLUORESCENT CORP., and HOUSE-O-LITE CORP.,
Respondents.

Petition for Enforcement of an Order of the National Labor Relations Board

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed on March 20, 1986, in the above-entitled cause by Intervenor Local 134, I.B.E.W., no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Jesse E. Eschbach, now Senior Circuit Judge, took senior status on November 5, 1985.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

HARVSTONE MANUFACTURING CORPORATION	Case 13—CA—22790
DURAY FLUORESCENT MANUFACTURING CO.	Case 13—CA—22839
AMERICAN FLUORESCENT CORP.	Case 13—CA—22840
HOUSE-O-LITE CORPORATION	Case 13—CA—22841

and

LOCAL UNION NO. 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

DECISION AND ORDER

On 29 February 1984 Administrative Law Judge Stanley N. Olbaum issued the attached decision. The Respondents filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and a supporting brief, the Charging Party filed a brief, and the Respondents filed an answering brief to the General Counsel's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order as modified.

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[1] We agree with the judge's conclusion that the parties had not reached impasse when the Respondents commenced unilaterally altering the employees' terms and conditions of employment. In so doing, however, we rely solely on his finding that the Respondents unlawfully refused to provide certain financial records to the Union. We do not find,

(Footnote continued on following page).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Harvstone Manufacturing Corporation, Elk Grove Village, Illinois; Duray Fluorescent Manufacturing Co., Chicago, Illinois; American Fluorescent Corp., Chicago, Illinois; and House-O-Lite Corporation, Chicago, Illinois, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraphs A,1,a, A,2,a(1), B,1,a, B,2,a(1), C,1,a, and C,2,a(1) and reletter the subsequent paragraphs.

2. Substitute the attached notices for the administrative law judge's Appendices B, C, and D.

Dated, Washington, D.C. 25 October 1984

Donald L. Dotson, Chairman

Robert P. Hunter, Member

Patricia Diaz Dennis, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

(Footnote continued from preceding page).

however, that the Respondents unlawfully discontinued Christmas bonuses, prizes, and parties because we find them to be in the nature of gifts rather than terms and conditions of employment. See *Benchmark Industries,* 270 NLRB No. 8 (Apr. 26, 1984).

APPENDIX B

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had full opportunity to present evidence and argue their positions, the National Labor Relations Board has decided that we violated the National Labor Relations Act by failing to bargain collectively in good faith with Local Union No. 134, International Brotherhood of Electrical Workers (your duly authorized exclusive collective-bargaining representative), through our unilateral discontinuance and withdrawal of various of your job benefits (namely, the 5-minute paid washup period at quitting time, the vacation scheduling system, paid group insurance for your dependents, and the furnishing of COLA schedules and payment of COLAs due on and since 30 August 1982) and through our failure to permit your Union to see our books and records to verify claims by us that our financial competitive condition is being impaired by your wage and other bargaining demands.

WE WILL NOT do these or similar things any more.

WE WILL at once reinstate the benefits we have discontinued, and pay you, with interest, for their value; and WE WILL maintain them in effect until the outcome of resumed collective-bargaining with your Union.

WE WILL, on request, resume collective bargaining with your Union, and WE WILL bargain in good faith with your Union concerning your wages, hours, and other terms and conditions of employment, and place into writing and sign any agreement reached, WE WILL also, in connection with such resumed collective bargaining, make available to your Union at its request our financial books, records, entries, and data regarding any claim we make as to financial hardship or difficulty to meet

your wage and other demands, including harm to our competitive position in the industry. The collective-bargaining unit is:

> All production and maintenance employees employed by Harvstone Manufacturing Corporation in its facility located at 1845 Tonne Road, Elk Grove Village, Illinois 60007, and excluding all office and clerical employees, plant guards and supervisors, as defined in the Labor-Management Relations Act of 1947, as amended.

HARVSTONE MANUFACTURING CORPORATION (Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Everett McKinley Dirksen Building, 219 South Dearborn Street, Chicago, Illinois 60604, Telephone 312-353-7589.

APPENDIX C

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had full opportunity to present evidence and argue their positions, the National Labor Relations Board has decided that we violated the National Labor Relations Act by failing to bargain collectively in good faith with Local Union No. 134, International Brotherhood of Electrical Workers (your duly authorized exclusive collective-bargaining representative), through our unilateral discontinuance and withdrawal of various of your job benefits (namely, the 5-minute paid washup period at quitting time, paid group insurance for your dependents, and the furnishing of COLA schedules and payment of COLAs due on and since 30 August 1982) and through our failure to permit your Union to see our books and records to verify claims by us that our financial competitive condition is being impaired by your wage and other bargaining demands.

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WE WILL, on request, resume collective bargaining with your Union, and WE WILL bargain in good faith with your Union concerning your wages, hours, and other terms and conditions of employment, and place into writing and sign any agreement reached. WE WILL ALSO, in connection with such resumed collective bargaining, make available to your Union at its request our financial books, records, entries, and data regarding any claim we make as to financial hardship or difficulty to meet

your wage and other demands, including harm to our competitive position in the industry. The collective-bargaining unit is:

> All production and maintenance employees employed by Duray Fluorescent Manufacturing Co. in its Chicago, Illinois plant and excluding all office and clerical employees, plant guards and supervisors, as defined in the Labor-Management Relations Act of 1947, as amended.

DURAY FLUORESCENT
MANUFACTURING CO.
(Employer)

Dated _____ By_____
(Representative) (Title)

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This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Everett McKinley Dirksen Building, 219 South Dearborn Street, Chicago, Illinois 60604, Telephone 312-353-7589.

APPENDIX D

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had full opportunity to present evidence and argue their positions, the National Labor Relations Board has decided that we violated the National Labor Relations Act by failing to bargain collectively in good faith with Local Union No. 134, International Brotherhood of Electrical Workers (your duly authorized exclusive collective-bargaining representative), through our unilateral discontinuance and withdrawal of various of your job benefits (namely, the 5-minute paid washup period at quitting time, the vacation scheduling system, paid group insurance for your dependents, and the furnishing of COLA schedules and payment of COLAs due on and since 30 August 1982) and through our failure to permit your Union to see our books and records to verify claims by us that our financial competitive condition is being impaired by your wage and other bargaining demands.

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any claim we make as to financial hardship or difficulty to meet your wage and other demands, including harm to our competitive position in the industry. The collective-bargaining unit is:

> All production and maintenance employees employed by American Fluorescent Corp. in its facility located at 3800 North Milwaukee Avenue, Chicago, Illinois 60641, and excluding all office and clerical employees, plant guards and supervisors, as defined in the Labor-Management Relations Act of 1947, as amended.

AMERICAN FLUORESCENT CORP. (Employer)

Dated _____ By_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Everett McKinley Dirksen Building, 219 South Dearborn Street, Chicago, Illinois 60604, Telephone 312-353-7589.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

HARVSTONE MANUFACTURING CORPORATION, **Respondent,** **and** **LOCAL UNION NO. 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,** **Charging Party.**	**Case No. 13-CA-22790**
DURAY FLUORESCENT MANUFACTURING CO., **Respondent,** **and** **LOCAL UNION NO. 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,** **Charging Party.**	**Case No. 13-CA-22839**
AMERICAN FLUORESCENT CORP., **Respondent,** **and** **LOCAL UNION NO. 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,** **Charging Party.**	**Case No. 13-CA-22840**
HOUSE-O-LITE CORPORATION, **Respondent,** **and** **LOCAL UNION NO. 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,** **Charging Party.**	**Case No. 13-CA-22841**

Alan M. Kaplan and Arly W. Eggertsen, Esqs.,
Chicago, Illinois, for NLRB General Counsel.
John T. Weise and Gwen V. Carroll, Esqs.
(Messrs Seyfarth, Shaw, Fairweather &
Geraldson, Attorneys), Chicago, Illinois,
for Respondents.
Robert E. Fitzgerald, Jr., Esq.,
Chicago, Illinois, for Charging Party.

DECISION

I. Preliminary Statement; Issues

OHLBAUM, Judge:— This proceeding[1] under the National Labor Relations Act as amended, 29 U.S.C. Sec. 151 *et seq.* ("Act"), was litigated before me in Chicago, Illinois, on June 28-30, 1983, with all parties participating throughout and afforded full opportunity to present evidence and contentions, as well as to file post-trial briefs which, after Respondents' unopposed application for time extension, were received in mid-August 1983. Briefs and record have been carefully considered.

The principal issues are whether Respondent Employers violated Section 8(a)(5) and (1) of the Act through making unilateral changes in wages, hours, and other terms and conditions of employment[2] of their collective bargaining unit employees, and failure and refusal to furnish necessary bargaining information and data, including access to financial records to support Respondents' economic contentions. By affirmative defenses, Respondents in turn assert that Charging Party Union failed to negotiate in good faith; that Respondents are under no legal obligation in respect to any "COLA" adjustment, which is in any event determinable only through arbitration; and that

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[1] Consolidated complaint dated February 25, 1983, as amended at hearing without opposition, based upon June 16, 1983 notice of intent to amend; growing out of charge filed in Case No. 13-CA-22790 on December 10 as amended December 16 and 30, 1982, and charges filed in Cases Nos. 13-CA-22839, 22840, and 22841, on December 30, 1982.

[2] *Viz.,* Christmas bonuses, gifts, and parties; contractually accrued cost-of-living wage adjustment ("COLA"); vacations; paid 5-minute wash-up period at end of workday; and group insurance for dependents. Attached *"Appendix A,"* summarizing the precise issues raised by the pleading, may assist the reader.

the benefit reductions of the unit employees were implemented only after good-faith bargaining to impasse.

Upon the entire record[3] and my observations of the testimonial demeanor of the witnesses, I make the following:—

FINDINGS AND CONCLUSIONS

II. Jurisdiction

At all material times Respondents Harvstone Manufacturing Corporation ("Harvstone"), Duray Fluorescent Manufacturing Co. ("Duray"), American Fluorescent Corp. ("American"), and House-O-Lite Corporation ("House-O-Lite"), each an Illinois corporation engaged in the manufacture or assembly and sale or distribution of fluorescent lighting equipment, and each with an office and place of business in or near Chicago, Illinois, have each, in the course and conduct of each of those respective businesses, during the representative calendar year immediately preceding issuance of the consolidated complaint, purchased and received at each of their aforesaid respective business locations, directly in interstate commerce from places outside of Illinois, goods and materials worth over $50,000; and, during the same period, each Respondent has, also in its said business, sold and shipped from its aforesaid business location, directly in interstate commerce to places outside of Illinois, goods and materials worth over $50,000.

I find that at all material times each Respondent has been and is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7), and Charging Party union a labor organization as defined by Section 2(5), of the Act.

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[3] Trial transcript corrected in accordance with NLRB General Counsel's unopposed August 12, 1983 motion annexed to his brief.

III. Alleged Unfair Labor Practices

A. Background

Respondents are fluorescent lighting equipment manufacturers, assemblers and distributors in the Chicago, Illinois area. Since around 1964 they have recognized and maintained collective bargaining relationships with Charging Party Union, reflected in written labor agreements of which the latest were effective from September 1, 1979 through August 31, 1982.

Eight negotiating sessions, commencing on August 11, 1982, were held by the parties prior to the August 31, 1982 expiration of their latest labor agreement, and three thereafter *(Stip. Exh. 6)*. No agreement was reached. Respondents rejected requests by the Union to bargain further *(Joint Exhs. 19-23)*.

B. Discussion and Resolution

The controlling facts are largely undisputed, being established by the pleadings and stipulations. Thus, Respondents concede that they unilaterally placed into effect the changes in wages, hours, and other terms and conditions of employment complained of in the complaint (*i.e.*, elimination of Christmas bonuses, gifts and parties[4], vacation schedules, 5-minute wash-up period at end of workday, contractually stipulated "COLA"s, and group insurance benefits for dependents). They claim, however, that they did so only after they reached "impasse" in their negotiations with their employees' bargaining representative, Charging Party Union.

It is well settled that an employer may impose changes in wages, hours, and other terms and conditions of employment of his collective bargaining unit employees after *bona-fide* "im-

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[4] Stipulated by Respondents Harvstone and American established for over 10 years (*Stip. Exhs. 1 & 3*) and by Respondent Duray for some 5 years (*Stip. Exh. 2*).

passe" is reached in negotiations following good-faith bargaining with the employees' representative. *NLRB v. Katz,* 369 U.S. 736 (1962; *Massey-Ferguson, Inc. v. NLRB,* 78 LRRM 2289 (7th Cir. 1971). However, it is also well settled that "impasse" is not reached through insistence by a party--employer or union—on bargaining about subjects which the other side is not required to bargain about (known as "nonmandatory" or "permissive" subjects). *NLRB v. Wooster Division of Borg-Warner Corp.,* 356 U.S. 342, 349 (1958); *United Contractors, Incorporated,* 244 N.L.R.B. 72 (1979), *enforced,* 108 LRRM 3152 (7th Cir. 1980); *Akron Novelty Mfg. Co.,* 224 N.L.R.B. 998, 1002 (1976); *Romo Paper Products Corp.,* 220 N.L.R.B. 519, 524-26 (1975), *enforced,* 93 LRRM 2336 (2d Cir. 1976).

In their previous collective agreement (September 1, 1979-August 31, 1982; *Joint Exh. 1,* Art. XIX, *Stip. Exh. 6, para.* 1A, p. 2), the parties had agreed and stipulated that a "COLA" was to be paid based upon a previous measurement period involving past consumer price indexes, such "COLA"s to be effective here on August 30, 1982 (within the contract period). Since "COLA"s, at any rate of this type, are always calculated upon the basis of change in the cost of living during an *expired* period, it is clear that the "COLA" calculation for the year prior to August 30, 1982 could not have been effective until August 30, 1982, as, indeed, provided in that contract. It is altogether clear that a labor contract, as any other contract, in this case that for 1979-82, providing for an agreed "COLA", or an agreed wage increase, or any other agreed term or condition of employment, may contain provisions applicable upon or after expiration of that contract (as, here, on August 30, 1982, reflecting the stipulated "COLA"), without necessity for execution or renegotiation of a further or new contract. (Thus, for example, stipulated wages do not end upon cessation of a labor contract, but continue thereafter, the payment of wages not being dependent upon execution or negotiation of a new

contract). The Board has so held. *See Struthers Wells,* 262 N.L.R.B. 1080 (1982), *enf. den. on other grounds,* F.2d , 114 LRRM 3553 (3d Cir. 1983; relates, in court's view, to freshly-bargained "future cost-of-living adjustments," *id.* at 3559, unlike instant case, involving accrued cost-of-living adjustments concededly "currently in effect" [letter of Respondents' negotiator and counsel, *Joint Exh. 9a/9b,* p. 2 second paragraph]); *Meilman Food Industries, Inc.,* 234 N.L.R.B. 698 (1978), *enforced,* 108 LRRM 2174 (D.C. Cir. 1979); *NLRB v. United Aircraft Corp.,* 490 F.2d 1105, 1110 (2d Cir. 1973), *enforcing in relevant part* 199 N.L.R.B. 658 (1972); *Capital City Lumber Company,* 263 N.L.R.B. 784 (1982). *Cf. Milwaukee Spring Division of Illinois Coil Spring Company* ("Milwaukee Spring II"), 268 N.L.R.B. No. 87 (Jan. 23, 1984: *no contractual provision involved*). Such previously negotiated contractual provisions, to take effect during or even after the term of the contract, are binding and do not require reincorporation into a further contract, any more than do "parachute" provisions dealing with payments to corporate executive employees subsequent to expiration of their employment contracts or upon termination of the business. What rational basis is there for treating non-executive employees' contractually-established comparable rights differently?

As is, or should be, well-understood, this being the existing state of Board law, I am bound thereby; and, if there is to be change therein, it must come from the Board or, other than the Supreme Court, applicable higher intermediate authority acquiesced in by the Board.[5] *See Armco Employees Independent*

[5] The foregoing concerns *only* the "COLA" effective on August 30, 1982 under the terms of the September 1, 1979-August 31, 1982 labor agreement. It does *not* concern new or future "COLA" provisions, which, the record shows, at the time negotiations here ceased, the Union, at the insistence of Respondents, had tentatively agreed to abadon, presumably in return for other hoped-for but unrealized concessions from Respondents.

Federation, Inc., 155 N.L.R.B. 551, 552 (1965); *Lenz Company*, 153 N.L.R.B. 1399, 1401 (1965); *Iowa Beef Packers, Inc.*, 144 N.L.R.B. 615, 616-17 (1963), *modified*, 331 F.2d 176 (8th Cir. 1964); *Novak Logging Company*, 119 N.L.R.B. 1573, 1575-76 (1958); *Ranco, Inc.*, 109 N.L.R.B. 998, 1009-10 fn. 8 (1954), *enforced*, 222 F.2d 543 (6th Cir. 1955), *reversed on other grounds*, 351 U.S. 105 (1956).

The record establishes, and I find, that not only was this "COLA" under the parties' 1979-82 agreement never placed into effect, but, during the parties' negotiations here under consideration, although Respondent Employers insisted without let-up that the subject of the accrued "COLA"s effective August 30, 1982, be bargained about as a condition to reaching any agreement, the Union refused to bargain on *that* subject, taking the position—correctly, under Board law (*supra*)—that that was an accrued right of the employees that had already been bargained about and was covered in and accrued under the September 1, 1979-August 31, 1982 collective agreement and therefore need not be bargained about again—in other words, that the statutory requirement to bargain about "wages, hours, and other terms and conditions of employment" refers only to *current or future* wages, hours, and other terms and conditions of employment, and *not to those negotiated in the past and accrued under a previous contract.* Respondent Employers just as adamantly insisted that the Union must bargain on that subject as a precondition to reaching agreement.[6] It was on the basis of the Employers' insistence that that subject must be bargained about and the Union's refusal to bargain about it, that Respondent Employers declared they had reached an

[6] *See, e.g., Joint Exh. 9a/9b,* p. 2 second paragraph: " . . . . *currently in effect"* (emphasis supplied); Stip. Exh. 6, *passim* and *id.* p. 15 last 4 lines re Meeting No. 10, and *id.* p. 16 lines 1-2; *Trial Transcript,* pp. 111-12, 114-15, 118, 120, 121, 122, 123-24, 125, 136-37, 156-57, 160, 165, 219-21, 224-25, 257, 261-62, 274, and 278.

"impasse" in their negotiations, and thereupon proceeded to impose the unilateral changes in their employees' wages, hours, and other terms and conditions of employment involved in the instant proceedings.

As has been stated, an "impasse," such as to constitute justification for unilateral changes in wages, hours, or other terms and conditions of employment, cannot effectively be declared by a party to collective negotiations upon the basis of that party's insistence (to such "impasse") upon bargaining about a "nonmandatory" subject of bargaining. Past wages, paid or contractually accrued and due, are not a "mandatory" subject of bargaining. Thus, an employer may not insist to "impasse," in negotiations to establish (current) "wages, hours, and other terms and conditions of employment," that his employees must refund or negotiate to repay to him past wages (or wages agreed to in the past), or to surrender their accrued right thereto, any more than a union may insist to "impasse" that an employer must pay the employees additional wages or benefits for an expired period covered by a previous contract. A party is not *required* to rebargain that which has already been secured to him by binding past agreement; he *may* do so if he wishes. Thus, if the Union had insisted that Respondent Employers rebargain the "COLA" stipulated in the 1979-82 contract, Respondent Employers would have been under no obligation to do so, since it formed a part of an already fully bargained and agreed-upon, binding contract and was therefore no longer a current "mandatory" bargaining subject. Indeed, if the Union had thereupon sought to exert economic power in support of such an insistence by striking (as here the Employers by declaring "impassee" and unilaterally implementing their demands), during the contract term in the presence of a subsisting arbitration requirement, Respondent Employers

could well presumably have had the right to *"Boys Markets"*[7] injunctive relief against the Union.[8]

The industrial peace which is the cornerstone objective of the Act would be unhinged and corrupted if that sort of insistence could be pursued to "impasse" so as to justify unilateral imposition of unbargained wages, hours, and other terms and conditions of employment on the basis thereof. It follows that Respondents' insistence upon bargaining about their employees' accrued right to the "COLA" effective August 30, 1982 under the September 1, 1979-August 31, 1982 contract, being an insistence upon bargaining concerning a "nonmandatory" subject on which the Union was not obligated to bargain, did not constitute good-faith bargaining as required by the Act, and could not and did not form a proper basis for a *bona-fide* "impasse" such as to justify the unilateral changes in wages, hours, and other terms and conditions of employment which Respondents concededly made.[9] Accordingly, those

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[7] *Boys Markets, Inc. v. Retail Clerks Local 770,* 398 U.S. 235 (1970).

[8] Nor have Respondents filed in bankruptcy or "arrangement"/reorganization proceedings. *Cf. NLRB v. Bildisco,* U.S. (Feb. 22, 1984) (No. 82-818).

[9] It may be argued that in practical effect Respondents' unyielding insistence on bargaining about a nonmandatory subject made no difference, since, because the subject of future (*i.e., post*-September 1, 1982) wages was up for negotiation, the "COLA" here in question was included therein and therefore "up for grabs." But this argument overlooks the important fact that by refusing to honor the "COLA" negotiated in 1979 Respondents were insisting that the wage negotiations start at a level 35 cents per hour below the wage that had been negotiated and was due under the 1979-82 contract, while the union was, properly and importantly, insisting that the wage bargaining start from the level of the required accrued wage, 35 cents higher. Furthermore, Respondent Employers improperly utilized the device of declaring "impasse" by their *ipse dixit,* because of their insistence on "bargaining" on this nonmanda-

(Footnote continued on following page).

unilateral changes were violative of Section 8(a)(5) and (1) of the Act, and I so hold and determine.

Additionally on this subject, although Respondents in their affirmative defense insist this subject (*i.e.*, entitlement to the "COLA" in question) must be arbitrated, the fact is that Respondents have at all times, including at the instant trial, refused to proceed or to agree unconditionally to proceed to arbitration thereon. Under these circumstances, and in order to avoid fragmentation of intermeshed issues, some of which are not arbitrable, and the question being essentially one of law already decided by the Board (*supra*), and having been fully litigated herein, and the contract in question having expired, Respondents' said affirmative defense is not interposed in good faith, lacks merit, and should be dismissed. *Cf., e.g., Meilman Food Industries, Inc.*, 234 N.L.R.B. 698 (1978), *enforced*, 108 LRRM 2175 (D.C. Cir. 1979); *Youngstown Sheet and Tube Co.*, 235 N.L.R.B. 572, 575 (1978); *Sahara Tahoe Corp.*, 229 N.L.R.B. 1094 (1977), *enforced*, 581 F.2d 767 (9th Cir. 1978); *Columbus Foundries, Inc.*, 229 N.L.R.B. 34 (1977); *Atlas Tack Corp.*, 226 N.L.R.B. 222 (1976), *enforced*, 559 F.2d 1201 (1st Cir. 1977); *United States Postal Service*, 225 N.L.R.B. 220 (1976); *Pilot Freight Carriers, Inc.*, 224 N.L.R.B. 341 (1976); *Sheet Metal Workers Local* 17 (George Koch Sons, Inc.), 199 N.L.R.B. 166, 168 (1972), *enforced*, 85 LRRM 2548 (1st Cir. 1973); *The Scam Instrument Corporation*, 163 N.L.R.B. 284, 289-90 and fns. 19 and 22 (1967), *enforced*, 394 F.2d 884 (7th Cir. 1968), *cert. denied*, 393 U.S. 980 (1968); *NLRB v. Thor Power Tool Company*, 351 F.2d 584, 587 (7th Cir. 1965).

(Footnote continued from preceding page).

tory subject of wage level already accrued and due and owing under the 1979-82 contract, to impose unilaterally a wage 35 cents less than was due and also to effect a spectrum of other significant unilateral changes in wages; hours, and other terms and conditions of employment they were without legal power to place into effect without good faith bargaining or bona-fide impasse.

The Question of Access to Respondents' Financial Data

During the course of the collective negotiations here, one of the Respondents (Duray) concededly raised a plea of "poverty" (March 10, 1983 Answer to Consolidated Complaint, *para.* XII [c]) to support its claim of economic necessity for its demands to scale down the wages and benefits of its unit employees. That Respondent nevertheless contends that at the bargaining session of August 31, 1982, the Union declined to accept its (*i.e.,* Duray's) "offered" financial information (*id. para.* XIII). The facts in this regard show no more than that when Respondents' negotiator held up, "just [as a] passing remark .... an aside" (his own testimony), during his comment that Duray was "losing money," an alleged profit and loss statement, the Union negotiator did not "ask" to see it, while conceding on cross-examination that he did say, "We will want to see it," within a context of Union demand and Employer refusal to inspect the latter's books and records. [10] Under these circumstances, it is clear that the Union's right to see Duray's financial records was not satisfied by waving an alleged profit and loss statement in the air, nor that it would have been even by inspection of such a statement, since the Union remained entitled to inspect and audit the actual relevant books and records[11]; and that the law's well-understood, rigorous require-

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[10] In this regard, General Counsel's motion at trial end to conform pleadings to proof, on which decision was reserved, is granted, the matter having been testified to by Respondents' negotiator Schoonhoven himself, negating any possibility of surprise or of countervailing proof by Respondents. *Cf. Nebraska Bulk Transport, Inc.,* 240 NLRB 135, 154-56 (1979), *enforced in relevant part,* 608 F.2d 311 (8th Cir. 1979).

[11] *Cf. Teleprompter Corp. v. NLRB,* 570 F.2d 4 (1st Cir. 1977).

ments to establish a waiver[12] by the Union of that right, have not been met.

Insofar as the remaining Respondents are concerned, while their negotiator skillfully avoided using the precise word "poverty," nevertheless, also to support their similar economic demands, while refusing to permit access to their financial records on the ground they were not pleading "poverty," he nevertheless insisted that "business judgment" (*Stip. Exh. 6*, p. 8) required them to "more closely align[ed]" their labor costs to that of competitors in other regions of the country "to be competitive" (*id.*), that "relief on labor costs" (*id.*) because of "poor competitive positions" (*id.* p. 12) was essential in order for Respondents to "stay in business, [otherwise] no one will have jobs" (*id.* p. 13), that Respondents "need economic relief" (*Trial Transcript* p. 98), that if economic concessions demanded by Respondents were not acceded to by the Union, Respondents "could, but .... not necessarily .... would **** go out of business (*id.* p. 138), that "one company was losing money and the rest might if they had to pay the 35¢ and .... these other items" (*id.* p. 160), that "One company was losing money, and the others would if the 35¢ was put in" (*id.* p. 161), that "if the Union doesn't agree with this concession [demanded by Respondent Employers] .... those companies [may] but not necessarily so .... be out of business" (*id.* p. 166), that "I [Respondent Employers' negotiator] was giving him [the Union negotiator] the message we were very serious

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[12] *See, e.g., C&C Plywood Corporation,* 148 N.L.R.B. 414, 416-47 (1964), *enf. den.,* 351 F.2d 224 (9th Cir. 1965), *reversed,* 385 U.S. 421 (1967): *Tucker Steel Corp.,* 134 N.L.R.B. 323, 332 (1961) and cases cited; *NLRB v. Item Company,* 220 F.2d 956, 958-59 (5th Cir. 1955), *cert. denied,* 350 U.S. 836 (1955), *reh. denied,* 350 U.S. 905 (1955); *Tide Water Associated Oil Company,* 85 N.L.R.B. 1096, 1098 (1949). *Cf. Timken Roller Bearing Company v. NLRB,* 325 F.2d 746, 750-54 (6th Cir. 1963, *cert. denied,* 376 U.S. 971 (1964).

about this labor cost relief we were seeking" (*id.* p. 203), that "We [Respondent Employers] need our labor costs more in line with our competitors" (*id.* p. 222), that Respondent Employers "might or might not ["go out of business **** if we don't (get) the reductions in labor costs that (we) asked for"] and that the Respondent companies "may or may not" ["lose money **** if we don't (get) these reductions in labor that (we) asked for"] (*id.* pp. 266-67), that "I [Respondent Employers' negotiator] had quite a long discussion about competitiveness and if you don't make a profit, you can't be in business" (*id.* p. 279); and Respondent Harvstone's president Plonsker conceded here that all Respondents "were seeking economic relief from the Union by attempting to reduce employees' pay and benefits to the least or lowest common denominator found elsewhere in the country" (*id.* p. 299).

Against the background instruction of the Supreme Court, presumably enunciated to be heeded, that "If . . . an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy" (*NLRB v. Truitt Manufacturing Co.,* 351 U.S. 149, 152-53 [1956]), the Board has held that it is unnecessary to use the talismanic word "poverty" in order to trigger the requirement of fair substantiation of a plea of economic necessity during collective bargaining. Thus, in *Cincinnati Cordage and Paper Company,* 141 N.L.R.B. 72 (1963), the Board held that an employer's resistance to a wage increase demand on the stated ground that it could not remain "competitive" with other employers in the industry, constituted a "poverty" plea since in effect the employer was contending that granting of the demands would "lead to impoverishment" (*id.* at 77), requiring the furnishing of supporting data. To the same effect, *see Teleprompter Corp. v. NLRB,* 570 F.2d 4 (1st Cir. 1977); *Stockton District Kidney Bean Growers, Inc.,* 165 N.L.R.B. 223, 224-25 (1967); *Wheeling Pacific Company,* 151 N.L.R.B. 1192, 1224-25 (1965); *NLRB v. Western Wirebound Box Co.,* 356 F.2d 88, 90-92 (9th Cir. 1966), *enforcing* 145

N.L.R.B. 1539, 1543-45 (1964); *Peerless Distributing Company,* 144 N.L.R.B. 1510, 1514 (1963); *Taylor Foundry Company,* 141 N.L.R.B. 765, 766-67 (1963), *enforced,* 338 F.2d 1003 (5th Cir. 1964); *Tennessee Coal & Iron Division, U.S. Steel Corp.,* 122 N.L.R.B. 1519 (1959).

Respondents were thus under obligation to open their financial records to the Union to support their economic contentions, and their failure to do so was inconsistent with their statutory duty to bargain in good faith, and was, further, preclusive of their right to pronounce a *bona-fide* bargaining "impasse" upon which to bottom their unilateral changes in wages, hours, and other terms and conditions of employment here complained of, and was thereby violative of Section 8(a)(5) of the Act. Announcement of "impasse" following employers' refusal to supply data necessary to their employees' bargaining representative for bargaining purposes, is not effective to justify unilateral imposition of wages, hours, and other terms and conditions of employment not bargained in good faith. *NLRB v. Katz,* 369 U.S. 736 (1961); *Hi-Grade Materials Co.,* 239 N.L.R.B. 947, 957-58 (1978); *Palomar Corporation and Gateway Service Co.,* 192 N.L.R.B. 592, 596-98 (1971), *enforced,* 465 F.2d 731, 733-35 (5th Cir. 1972). Moreover, Respondents' refusal to permit access to the financial data in question, by making it impossible for their employees' bargaining representative to carry out its bargaining duties properly, interfered with, restrained and coerced those employees in the exercise of the rights guaranteed to them under Section 7, and was thereby violative of Section 8(a)(1), of the Act.

Upon the foregoing findings and the entire record, I state the following:

IV. Conclusions of Law

A. Jurisdiction is properly asserted in this proceeding.

B. By its actions, described and found in "III," *supra,* in unilaterally placing into effect changes in wages, hours, and

other terms and conditions of employment of their employees in the appropriate bargaining units hereafter set forth (*viz.*, unilateral discontinuance of established Christmas bonuses and parties, vacation schedules, and paid 5-minute wash-up periods at quitting time, by Respondent Harvstone; unilateral discontinuance of established Christmas food certificates and of paid 5-minute wash-up periods at quitting time, by Respondent Duray; unilateral discontinuance of established Christmas gifts, vacation schedules, and paid 5-minute wash-up periods at quitting time, by Respondent American; unilateral discontinuance of existing vacation schedules by Respondent House-O-Lite; unilateral discontinuance of paid group insurance benefits for dependents of eligible unit employees, by all Respondents; failure and refusal to permit inspection and audit of financial records necessary to Charging Party Union's performance of its bargaining function, by all Respondents; failure to prepare cost of living adjustment ("COLA") schedules for the third year of the parties' September 30, 1979 - August 31, 1982 collective agreements and to incorporate them into wages thereafter, and failure and refusal to implement and place into effect such "COLAs", by all Respondents), without bargaining in good faith or reaching *bona-fide* negotiating impasse, Respondents and each of them have failed and refused, and are continuing to fail and refuse, to bargain in good faith with Charging Party Union as the duly authorized exclusive collective bargaining representative of said employees, thereby violating Section 8(a)(5) of the National Labor Relations Act as amended.

The appropriate collective bargaining units are:

Respondent Harvstone

All production and maintenance employees employed by Harvstone Manufacturing Corporation in its facility located at 1845 Tonne Road, Elk Grove Village, Illinois 60007, and excluding all office and clerical employees,

plant guards and supervisors, as defined in the Labor-Management Relations Act of 1947, as amended.

Respondent Duray

All production and maintenance employees employed by Duray Fluorescent Manufacturing Co. in its Chicago, Illinois plant and excluding all office and clerical employees, plant guards and supervisors, as defined in the Labor-Management Relations Act of 1947, as amended.

Respondent American

All production and maintenance employees employed by American Fluorescent Corp. in its plant located at 3800 North Milwaukee Avenue, Chicago, Illinois 60641, and excluding all office and clerical employees, plant guards and supervisors, as defined in the Labor-Management Relations Act of 1947, as amended.

Respondent House-O-Lite

All production and maintenance employees employed by House-O-Lite Corporation in its plant located at 4041 South Emerald Avenue, Chicago, Illinois 60609, and excluding all office and clerical employees, plant guards and supervisors, as defined in the Labor-Management Relations Act of 1947, as amended.

C. By their said actions and each of them, Respondents and each of them have interfered with, restrained and coerced said employees in the exercise of their rights under Section 7, in violation of Section 8(a)(1), of said Act, and are continuing so to do.

D. The foregoing unfair labor practices and each of them, violative of the Act as aforesaid, have affected and, unless permanently restrained and enjoined, will continue to affect commerce within the meaning of Section 2(6) and (7) of the Act.

V. Remedy

Respondents should be required to cease and desist from the violations found and from like or related violations, and to take certain affirmative remedial measures customarily required in cases of this variety. Those affirmative measures should include resumption of collective bargaining in good faith until agreement or *bona-fide* impasse is reached; the placing into writing and signing of any agreement or agreements reached; cancellation by Respondents of their unilateral actions here found to have been violative of the Act, and reinstitution of all such unilaterally cancelled terms and conditions of employment pending the outcome of renewed good-faith collective bargaining, and making their employees whole, with interest, calculated as explicated by the Board in *F.W. Woolworth Company,* 90 N.L.R.B. 289 (1950), *Isis Plumbing & Heating Company,* 138 N.L.R.B. 716 (1962), and *Florida Steel Corporation,* 231 N.L.R.B. 651 (1977), for all such unilaterally cancelled benefits and changes in wages, hours, and other terms and conditions of employment, including the "COLA" provided for in the parties' 1979-82 agreement to be effective on August 30, 1982, and to furnish the required related "COLA" schedules. Respondents should also be required to open their books and financial records to Charging Party Union or its representatives, for inspection, audit and copying, to substantiate Respondents' claims or contentions of financial inability, stringency, hardship, noncompetitiveness, or like positions taken by Respondents during collective bargaining with Charging Party Union in opposition to wage and other economic demands of said Union or in support of such counterdemands or proposals by Respondents or any of them. Respondents should also be required to preserve and make available to the Board's agents their books and records for backpay and compliance determination purposes; and to post the usual informational notice to employees of the outcome of this proceeding.

VI.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this consolidated proceeding, and pursuant to Section 10(c) of the Act, there is hereby issued the following:[13]

ORDER

IT IS HEREBY ORDERED THAT:—

A. Respondent HARVSTONE MANUFACTURING CORPORATION, its officers, agents, successors and assigns, shall:

1. Cease and desist from unilaterally and without bargaining in good faith with Local Union No. 134, International Brotherhood of Electrical Workers, as the duly authorized exclusive bargaining representative of Harvstone's employees in the appropriate collective bargaining unit hereinafter set forth:

a. Discontinuing, canceling, eliminating, or revoking its Christmas gift, bonus, payment, prize, honorarium, or party system for said employees as in effect and existence on August 31, 1982.

b. Discontinuing, canceling, eliminating, or revoking its paid 5-minute wash-up period at quitting time for said employees as in effect and existence on August 31, 1982.

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[13] In the event no exceptions are filed as provided in Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order which follows herein shall, as provided in Section 102.48 of those Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

c. Discontinuing, canceling, eliminating, revoking, or revising its vacation scheduling system for said employees as in effect and existence on August 31, 1982.

d. Discontinuing, canceling, eliminating, revoking, or failing to keep in effect and make premium and other required payments on group insurance policies and coverage for the dependents of its said employees, to the same extent and as in effect and existence on August 31, 1982.

e. Preparing and supplying to its said employees or their aforementioned bargaining representative, separate cost-of-living adjustment ("COLA") schedules for 1981-82.

f. Failing or refusing to pay to its said employees the cost-of-living adjustments ("COLA"s) due to them on and since August 30, 1982 under the terms and provisions of the collective agreement of September 1, 1979—August 31, 1982.

g. Failing or refusing to supply to the aforementioned bargaining representative said Respondent's financial books, records and entries, including access thereto for verification, audit and copying purposes, necessary for said bargaining representative's proper performance of its bargaining function, including all such books, records, entries and data supporting or allegedly supporting any claim or assertion by said Respondent of financial or economic inability, stringency, hardship, difficulty, or competitive disadvantage in connection with matters arising in wage and other collective negotiations with said bargaining representative.

h. In any like or related manner failing or refusing to bargain in good faith with said bargaining

representative; or interfering with, restraining, or coercing said Respondent's employees in the exercise of any of their rights under the National Labor Relations Act as amended.

The appropriate collective bargaining unit is:

All production and maintenance employees employed by Harvstone Manufacturing Corporation in its facility located at 1845 Tonne Road, Elk Grove Village, Illinois 60007, and excluding all office and clerical employees, plant guards and supervisors, as defined in the Labor-Management Relations Act of 1947, as amended.

2. Take the following affirmative actions, necessary to effectuate the policies of the Act:

a. Forthwith reinstate, give effect to, and maintain in effect until the outcome of good-faith collective bargaining with the aforementioned bargaining representative:

(1) Said Respondent's Christmas gift, bonus, payment, prize, honorarium, and party system for said employees, as in effect and existence on August 31, 1982.

(2) Said Respondent's paid 5-minute wash-up period at quitting time for said employees, as in effect and existence on August 31, 1982.

(3) Said Respondent's vacation scheduling system for said employees, as in effect and existence on August 31, 1982.

(4) Group insurance policies and coverages, paid for by said Respondent, for dependents of said employees, as in effect and existence on August 31, 1982.

b. Promptly supply to said employees or their aforementioned bargaining representative, separate

cost-of-living adjustment ("COLA") schedules for 1981-82.

c. Make each of its said employees whole, with interest calculated in the manner described in the "Remedy" portion of the decision of which this Order forms a part, by reason of the unilaterally discontinued payments and benefits, including "COLA"s due on and since August 30, 1982 under the terms and provisions of the collective agreement of September 1, 1979-August 31, 1982, and also reimbursement to each of said employees for any expense or obligation incurred by them or their previously insured dependents by reason of said Respondent's cancellation of coverage or nonpayment of premium on any of said Respondent's group insurance so cancelled or withdrawn by said Respondent.

d. Make available to the aforementioned bargaining representative, said Respondent's financial books, records, entries and data, including access thereto for verification, audit and copying, necessary for said representative's proper performance of its bargaining function, including all such books, records, entries and data supporting or relating to any claim or contention by said Respondent of financial or economic inability, stringency, hardship, difficulty, or competitive disadvantage in connection with matters arising in wage or other collective negotiations with said bargaining representative.

e. Upon request, bargain in good faith with said bargaining representative, concerning wages, hours, and other terms and conditions of employment of Respondent's said employees, and commit to writing and execute any agreement reached.

f. Preserve and upon request make available to the Board or its agents, for examination and copying,

all payroll records, wage rate and other records, work schedules, vacation and vacation scheduling records, Christmas bonus, gift, prize, party and other records, insurance policy, coverage and premium payment records and correspondence and memoranda and entries, social security payment records, timecards, personnel records and reports, and all other records and entries necessary or helpful to determine the amounts of backpay and other sums and benefits due under and the extent of compliance with the terms of this Order.

g. Post at its premises copies of the Notice attached hereto marked "Appendix B."[14] Copies of said Notice, on forms provided by the Board's Regional Director for its 13th Region shall, after being signed by said Respondent's authorized representative, be posted by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said Notices are not altered, defaced, or covered by any other material.

h. Notify said Regional Director in writing, within 20 days from the date of this Order, what steps said Respondent has taken to comply therewith.

B. Respondent DURAY FLUORESCENT MANUFACTURING CO., its officers, agents, successors and assigns, shall:

1. Cease and desist from unilaterally and without bargaining in good faith with Local Union No. 134,

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[14] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the Notice "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

International Brotherhood of Electrical Workers, as the duly authorized exclusive bargaining representative of Duray's employees in the appropriate collective bargaining unit hereinafter set forth:

a. Discontinuing, canceling, eliminating, or revoking its Christmas food certificates, gift, bonus, or payment system for said employees as in effect and existence on August 31, 1982.

b. Discontinuing, canceling, eliminating, or revoking its paid 5-minute wash-up period at quitting time for said employees as in effect and existence on August 31, 1982.

c. Discontinuing, canceling, eliminating, revoking, or failing to keep in effect and make premium and other required payments on group insurance policies and coverage for the dependents of its said employees, to the same extent and as in effect and existence on August 31, 1982.

d. Preparing and supplying to its said employees or their aforementioned bargaining representative, separate cost-of-living adjustment ("COLA") schedules for 1981-82.

e. Failing or refusing to pay to its said employees the cost-of-living adjustments ("COLA"s) due to them on and since August 30, 1982 under the terms and provisions of the collective agreement of September 1, 1979-August 31, 1982.

f. Failing or refusing to supply to the aforementioned bargaining representative said Respondent's financial books, records and entries, including access thereto for verification, audit and copying purposes, necessary for said bargaining representative's proper performance of its bargaining function, including all such books, records, entries and data supporting or

allegedly supporting any claim or assertion by said Respondent of financial or economic inability, stringency, hardship, difficulty, or competitive disadvantage in connection with matters arising in wage and other collective negotiations with said bargaining representative.

g. In any like or related manner failing or refusing to bargain in good faith with said bargaining representative; or interfering with, restraining, or coercing said Respondent's employees in the exercise of any of their rights under the National Labor Relations Act as amended.

The appropriate collective bargaining unit is:

All production and maintenance employees employed by Duray Fluorescent Manufacturing Co. in its Chicago, Illinois plant and excluding all office and clerical employees, plant guards and supervisors, as defined in the Labor-Management Relations Act of 1947, as amended.

2. Take the following affirmative actions, necessary to effectuate the policies of the Act:

amounts of backpay and other sums and benefits due under and the extent of compliance with the terms of this Order.

g. Post at its premises copies of the Notice attached hereto marked "Appendix C."[15] Copies of said Notice, on forms provided by the Board's Regional Director for its 13th Region shall, after being

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[15] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the Notice "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

signed by said Respondent's authorized representative, be posted by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said Notices are not altered, defaced, or covered by any other material.

h. Notify said Regional Director in writing, within 20 days from the date of this Order, what steps said Respondent has taken to comply therewith.

C. Respondent AMERICAN FLUORESCENT CORP., its officers, agents, successors and assigns, shall:

1. Cease and desist from unilaterally and without bargaining in good faith with Local Union No. 134, International Brotherhood of Electrical Workers, as the duly authorized exclusive bargaining representative of American's employees in the appropriate collective bargaining unit hereinafter set forth:

a. Discontinuing, canceling, eliminating, or revoking its Christmas gift, bonus or payment system for said employees as in effect and existence on August 31, 1982.

b. Discontinuing, canceling, eliminating, or revoking its paid 5-minute wash-up period at quitting time for said employees as in effect and existence on August 31, 1982.

c. Discontinuing, canceling, eliminating, revoking, or revising its vacation scheduling system for said employees as in effect and existence on August 31, 1982.

d. Discontinuing, canceling, eliminating, revoking, or failing to keep in effect and make premium and other required payments on group insurance policies and coverage for the depen-

dents of its said employees, to the same extent and as in effect and existence on August 31, 1982.

e. Preparing and supplying to its said employees or their aforementioned bargaining representative, separate cost-of-living adjustment ("COLA") schedules for 1981-82.

f. Failing or refusing to pay to its said employees the cost-of-living adjustments ("COLA"s) due to them on and since August 30, 1982 under the terms and provisions of the collective agreement of September 1, 1979-August 31, 1982.

g. Failing or refusing to supply to the aforementioned bargaining representative said Respondent's financial books, records and entries, including access thereto for verification, audit and copying purposes, necessary for said bargaining representative's proper performance of its bargaining function, including all such books, records, entries and data supporting or allegedly supporting any claim or assertion by said Respondent of financial or economic inability, stringency, hardship, difficulty, or competitive disadvantage in connection with matters arising in wage and other collective negotiations with said bargaining representative.

h. In any like or related manner failing or refusing to bargain in good faith with said bargaining representative; or interfering with, restraining, or coercing said Respondent's employees in the exercise of any of their rights under the National Labor Relations Act as amended.

The appropriate collective bargaining unit is:

All production and maintenance employees employed by American Fluorescent Corp. in its plant located at 3800 North Milwaukee Avenue, Chicago, Illinois 60641, and

excluding all office and clerical employees, plant guards and supervisors, as defined in the Labor-Management Relations Act of 1947, as amended.

2. Take the following affirmative actions, necessary to effectuate the policies of the Act:

a. Forthwith reinstate, give effect to, and maintain in effect until the outcome of good-faith collective bargaining with the aforementioned bargaining representative:

(1) Said Respondent's Christmas gift, bonus, or payment system for said employees, as in effect and existence on August 31, 1982.

(2) Said Respondent's paid 5-minute wash-up period at quitting time for said employees, as in effect and existence on August 31, 1982.

(3) Said Respondent's vacation scheduling system for said employees, as in effect and existence on August 31, 1982.

(4) Group insurance policies and coverages, paid for by said Respondent, for dependents of said employees, as in effect and existence on August 31, 1982.

b. Promptly supply to said employees or their aforementioned bargaining representative, separate cost-of-living adjustment ("COLA") schedules for 1981-82.

c. Make each of its said employees whole, with interest calculated in the manner described in the "Remedy" portion of the decision of which this Order forms a part, by reason of the unilaterally discontinued payments and benefits, including "COLA"s due on and since August 30, 1982 under the terms and provisions of the collective agreement of September 1,

1979-August 31, 1982, and also reimbursement to each of said employees for any expense or obligation incurred by them or their previously insured dependents by reason of said Respondent's cancellation of coverage or nonpayment of premium on any of said Respondent's group insurance so cancelled or withdrawn by said Respondent.

d. Make available to the aforementioned bargaining representative, said Respondent's financial books, records, entries and data, including access thereto for verification, audit and copying, necessary for said representative's proper performance of its bargaining function, including all such books, records, entries and data supporting or relating to any claim or contention by said Respondent of financial or economic inability, stringency, hardship, difficulty, or competitive disadvantage in connection with matters arising in wage or other collective negotiations with said bargaining representative.

e. Upon request, bargain in good faith with said bargaining representative, concerning wages, hours, and other terms and conditions of employment of Respondent's said employees, and commit to writing and execute any agreement reached.

f. Preserve and upon request make available to the Board or its agents, for examination and copying, all payroll records, wage rate and other records, work schedules, vacation and vacation scheduling records, Chirstmas bonus, gift and other records, insurance policy, coverage and premium payment records and correspondence and memoranda and entries, social security payment records, timecards, personnel records and reports, and all other records and entries necessary or helpful to determine the amounts of

backpay and other sums and benefits due under and the extent of compliance with the terms of this Order.

g. Post at its premises copies of the Notice attached hereto marked "Appendix D."[16] Copies of said Notice, on forms provided by the Board's Regional Director for its 13th Region shall, after being signed by said Respondent's authorized representative, be posted by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said Notices are not altered, defaced, or covered by any other material.

h. Notify said Regional Director in writing, within 20 days from the date of this Order, what steps said Respondent has taken to comply therewith.

D. Respondent HOUSE-O-LITE CORPORATION, its officers, agents, successors, and assigns, shall:

1. Cease and desist from unilaterally and without bargaining in good faith with Local Union No. 134, International Brotherhood of Electrical Workers, as the duly authorized exclusive bargaining representative of House-O-Lite's employees in the appropriate collective bargaining unit hereinafter set forth:

a. Discontinuing, canceling, eliminating, revoking, or revising its vacation scheduling system for said employees as in effect and existence on August 31, 1982.

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[16] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the Notice "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

b. Discontinuing, canceling, eliminating, revoking, or failing to keep in effect and make premium and other required payments on group insurance policies and coverage for the dependents of its said employees, to the same extent and as in effect and existence on August 31, 1982.

c. Preparing and supplying to its said employees or their aforementioned bargaining representative, separate cost-of-living adjustment ("COLA") schedules for 1981-82.

d. Failing or refusing to pay to its said employees the cost-of-living adjustments ("COLA"s) due to them on and since August 30, 1982 under the terms and provisions of the collective agreement of September 1, 1979-August 31, 1982.

e. Failing or refusing to supply to the aforementioned bargaining representative said Respondent's financial books, records and entries, including access thereto for verification, audit and copying purposes, necessary for said bargaining representative's proper performance of its bargaining function, including all such books, records, entries and data supporting or allegedly supporting any claim or assertion by said Respondent of financial or economic inability, stringency, hardship, difficulty, or competitive disadvantage in connection with matters arising in wage and other collective negotiations with said bargaining representative.

f. In any like or related manner failing or refusing to bargain in good faith with said bargaining representative; or interfering with, restraining, or coercing said Respondent's employees in the exercise of any of their rights under the National Labor Relations Act as amended.

The appropriate collective bargaining unit is:

All production and maintenance employees employed by House-O-Lite Corporation in its plant located at 4041 South Emerald Avenue, Chicago, Illinois 60609, and excluding all office and clerical employees, plant guards and supervisors, as defined in the Labor-Management Relations Act of 1947, as amended.

2. Take the following affirmative actions, necessary to effectuate the policies of the Act:

a. Forthwith reinstate, give effect to, and maintain in effect until the outcome of good-faith collective bargaining with the aforementioned bargaining representative:

(1) Said Respondent's vacation scheduling system for said employees, as in effect and existence on August 31, 1982.

(2) Group insurance policies and coverages, paid for by said Respondent, for dependents of said employees, as in effect and existence on August 31, 1982.

b. Promptly supply to said employees or their aforementioned bargaining representative, separate cost-of-living adjustment ("COLA") schedules for 1981-82.

c. Make each of its said employees whole, with interest calculated in the manner described in the "Remedy" portion of the decision of which this Order forms a part, by reason of the unilaterally discontinued payments and benefits, including "COLA"s due on and since August 30, 1982 under the terms and provisions of the collective agreement of September 1, 1979-August 31, 1982, and also reimbursement to each of said employees for any expense or obligation

incurred by them or their previously insured dependents by reason of said Respondent's cancellation of coverage or nonpayment of premium on any of said Respondent's group insurance so cancelled or withdrawn by said Respondent.

d. Make available to the aforementioned bargaining representative, said Respondent's financial books, records, entries and data, including access thereto for verification, audit and copying, necessary for said representative's proper performance of its bargaining function, including all such books, records, entries and data supporting or relating to any claim or contention by said Respondent of financial or economic inability, stringency, hardship, difficulty, or competitive disadvantage in connection with matters arising in wage or other collective negotiations with said bargaining representative.

e. Upon request, bargain in good faith with said bargaining representative, concerning wages, hours, and other terms and conditions of employment of Respondent's said employees, and commit to writing and execute any agreement reached.

f. Preserve and upon request make available to the Board or its agents, for examination and copying, all payroll records, wage rate and other records, work schedules, vacation and vacation scheduling records, insurance policy, coverage and premium payment records and correspondence and memoranda and entries, social security payment records, timecards, personnel records and reports, and all other records and entries necessary or helpful to determine the amounts of backpay and other sums and benefits due under and the extent of compliance with the terms of this Order.

g. Post at its premises copies of the Notice attached hereto marked "Appendix E."[17] Copies of said Notice, on forms provided by the Board's Regional Director for its 13th Region shall, after being signed by said Respondent's authorized representative, be posted by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said Notices are not altered, defaced, or covered by any other material.

h. Notify said Regional Director in writing, within 20 days from the date of this Order, what steps said Respondent has taken to comply therewith.

IT IS FURTHER ORDERED that Respondents' affirmative defenses contained in their Answer be and they are hereby dismissed.

Dated at Washington, D.C., February 29, 1984.

Stanley N. Ohlbaum
Administrative Law Judge

[17] In the event that the Board's order is enforced by a Judgment of a United States Court of Appeals, the words in the Notice "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Summary of Pleadings (as amended)
(A: admitted; D: denied; U: Union;
o/a: on or about)

Am. Consol. Complt. ¶(s)*	Respondent	Date	Allegation	Answer
VIII (a) & (c) & XIX	All	o/a (& since) 9/1/82	Unilateral failure to grant unit employees COLAs under 1979-82 collective agreement	D eligibility; D no prior notice to U; D not affording U opportunity to negotiate thereon
VII (b) & (c) & XIX	All	o/a (& since) 9/1/82	Failure to prepare separate COLA adjustment schedules for 1981-82	D obligation; D no prior notice to U; D not affording U opportunity to negotiate thereon
IX (a) & (e) & XX	Harvstone	Since o/a 9/1/82	Unilateral elimination of paid 5-minute wash-up period at quitting time	A; D no prior notice to U; D not affording U opportunity to negotiate thereon
IX (b) & (e) & XX	Harvstone	Since o/a 12/23/82	Unilateral discontinuance of Christmas party for unit employees	D cessation of any "past practice."

* As renumbered by amendment at trial.

Summary of Pleadings (as amended)
(A: admitted; D: denied; U: Union;
o/a: on or about)

Am. Consol. Complt. ¶(s)*	Respondent	Date	Allegation	Answer
IX (c) & (e) & XX	Harvstone	Since o/a 12/23/82	Unilateral discontinuance of $50 Christmas bonus to "most outstanding unit employee	D cessation of any "past practice"
IX (d) & (e) & XX	Harvstone	Since o/a 12/23/82	Unilateral discontinuance of Christmas bonuses to unit employees	D cessation of any "past practice"
X (a) & (b) & XXI	Duray	Since o/a 12/82	Unilateral discontinuance of past practice of giving unit employees $15.00 food certificates with last paycheck before Christmas	D cessation of "past practice"
XI (a; as amended at trial) & (b) & XXII	American	Since o/a 12/23/82	Unilateral discontinuance of giving Christmas gift to unit employees (as amended at trial)	D cessation of "past practice"

* As renumbered by amendment at trial.

Appendix A
Summary of Pleadings (as amended)
(A: admitted; D: denied; U: Union; o/a: on or about)

Am. Consol. Compl. ¶(s)*	Respondent	Date	Allegation	Answer
XII (a; as amended at trial) & (c), XIII, XIV, & XIX	Harvstone	o/a (& since) 8/26/82	U requested Harvstone to permit audit of its financial records, necessary to U's performance of its bargaining function; & Respt continues to fail and refuse to do so	D but A U request to Harvstone on 8/26/82 to "show us your books"
XII(b)** XIII, XIV, & XIX	Duray	Since o/a 8/13/82	U requested Duray to supply copy of profit and loss statement	(D)
XII (c)** & (d)**, XIII, XIV, & XIX	All	o/a (& since) 12/21/82 [& o/a 8/26/82]	U requested Respondents to permit audit of their financial records, necessary to U's performance of its bargaining function; & Respondents continue to fail & refuse to do so	D but A U requested it "wants to see your books"; & A that Duray pleaded inability to pay & on 8/31/82 "offered financial information which the Union did not accept."
XIV & XIX	All		Through acts & conduct alleged in paras. VIII, IX, X, XI, & XIII, Respondents have failed and refused to begin with U in good faith, w/o reaching impasse	D

* As renumbered by amendment at trial.
** As renumbered by trial-end motion, granted in decision, to conform pleadings to proof.

Appendix A

Summary of Pleadings (as amended)
(A: admitted; D: denied; U: Union;
o/a: on or about)

Am. Consol. Complt. ¶(s)*	Respondent	Date	Allegation	Answer
XV (a) & (c) & XX	Harvstone	Since o/a 1/1/83	Unilateral discontinuance of paid group insurance benefits for dependents of eligible unit employees, without reaching impasse	A but D unilateral & D without reaching impasse
XV (b) & (c) (as am.) & XX	Harvstone	Since o/a 5/1/83	Unilateral discontinuance of existing vacation schedules for unit employees	A, but did so only after impasse in negotiations
XVI (a) & (c) & XXI	Duray	Since o/a 2/1/83	Unilateral discontinuance of paid group insurance benefits for dependents of eligible unit employees, without reaching impasse	A but D unilateral & D without reaching impasse
XVI (b) & (c) & XXI	Duray	Since o/a 2/1/83	Unilateral elimination of paid 5-minute wash-up period at quitting time, without reaching impasse	A but D unilateral & D without reaching impasse

* As renumbered by amendment at trial.

Appendix A

Summary of Pleadings (as amended)
(A: admitted; D: denied; U: Union;
o/a: on or about)

Am. Consol. Compl. ¶(s)*	Respondent	Date	Allegation	Answer
XVII (a) & (d) & XXII	American	Since o/a beginning of Jan. 83	Unilateral discontinuance of paid group insurance benefits for dependents of eligible unit employees, without reaching impasse	A but D unilateral & without reaching impasse
XVII (b) & (d) & XXII	American	Since o/a 1/6/83	Unilateral elimination of paid 5-minute wash-up period at quitting time without reaching impasse	A but D unilateral & without reaching impasse
XVII (c) & (d) & XXII	American	Since o/a 1/1/83	Unilateral discontinuance of existing vacation schedules for unit employees	A but did so only after impasse in negotiations
XVIII (a) & (c) & XXIII	House-O-Lite	o/a beginning of Jan. 83	Unilateral discontinuance of paid group insurance benefits for dependents of eligible for dependents unit employees, without reaching impasse	A but did so only after impasse in negotiations

* As renumbered by amendment at trial.

Appendix A

Summary of Pleadings (as amended)
(A: admitted; D: denied; U: Union; o/a: on or about)

Am. Consol. Complt. ¶(s)*	Respondent	Date	Allegation	Answer
XVIII (b) & (c) & XXIII	House-O-Lite	o/a May 83	Unilateral discontinuance of existing vacation schedules for unit employees	A but did to only after impasse in negotiations.

* As renumbered by amendment at trial.

Appendix B

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

After a hearing at which all sides had full opportunity to present evidence and argue their positions, the National Labor Relations Board has decided that we violated the National Labor Relations Act as amended, by failing to bargain collectively in good faith with Local Union No. 134, International Brotherhood of Electrical Workers (your duly authorized exclusive collective bargaining representative), through our unilateral discontinuance and withdrawal of various of your job benefits (namely, Christmas bonuses, gifts, prize, payments, and party; 5-minute paid wash-up period at quitting time; vacation-scheduling system; paid group insurance for your dependents; furnishing of COLA schedules and payment of COLAs due on and since August 30, 1982) and through our failure to permit your Union to see our books and records to verify claims by us that our financial competitive condition is being impaired by your wage and other bargaining demands.

WE WILL NOT do these or similar things any more.

WE WILL at once reinstate the benefits we have discontinued, and pay you, with interest, for their value; and WE WILL maintain them in effect until the outcome of resumed collective bargaining with your Union.

WE WILL, upon request, resume collective bargaining with your Union, and WE WILL bargain in good faith with your Union concerning your wages, hours, and other terms and conditions of employment, and place into writing and sign any agreement reached. WE WILL ALSO, in connection with such resumed collective bargaining, make available to your Union at its request our financial books, records, entries and data regarding any claim we make as to financial hardship or difficulty to meet your wage and other demands, including harm to our competitive position in the industry.

The collective bargaining unit is:

> All production and maintenance employees employed by Harvstone Manufacturing Corporation in its facility located at 1845 Tonne Road, Elk Grove Village, Illinois 60007, and excluding all office and clerical employees, plant guards and supervisors, as defined in the Labor-Management Relations Act of 1947, as amended.

HARVSTONE MANUFACTURING CORPORATION
(Employer)

Dated _____ By_____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Everett McKinley Dirksen Building, 219 S. Dearborn Street, Chicago, Illinois 60604 (Telephone No. (312) 353-7574).

Appendix C

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

After a hearing at which all sides had full opportunity to present evidence and argue their positions, the National Labor Relations Board has decided that we violated the National Labor Relations Act as amended, by failing to bargain collectively in good faith with Local Union No. 134, International Brotherhood of Electrical Workers (your duly authorized exclusive collective bargaining representative), through our unilateral discontinuance and withdrawal of various of your job benefits (namely, Christmas food certificates, gift, bonus, or payment; 5-minute paid wash-up period at quitting time; paid group insurance for your dependents; furnishing of COLA schedules and payment of COLAs due on and since August 30, 1982) and through our failure to permit your Union to see our books and records to verify claims by us that our financial competitive condition is being impaired by your wage and other bargaining demands.

WE WILL NOT do these or similar things any more.

WE WILL at once reinstate the benefits we have discontinued, and pay you, with interest, for their value; and WE WILL maintain them in effect until the outcome of resumed collective bargaining with your Union.

WE WILL, upon request, resume collective bargaining with your Union, and WE WILL bargain in good faith with your Union concerning your wages, hours, and other terms and conditions of employment, and place into writing and sign any agreement reached. WE WILL ALSO, in connection with such resumed collective bargaining, make available to your Union at its request our financial books, records, entries and data regarding any claim we make as to financial hardship or difficulty to meet your wage and other demands, including harm to our competitive standing in the industry.

The collective bargaining unit is:

> All production and maintenance employees employed by Duray Fluorescent Manufacturing Co. in its Chicago, Illinois plant and excluding all office and clerical employees, plant guards and supervisors, as defined in the Labor-Management Relations Act of 1947, as amended.

DURAY FLUORESCENT
MANUFACTURING CO.
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Everett McKinley Dirksen Building, 219 S. Dearborn Street, Chicago, Illinois 60604 (Telephone No. (312) 353-7574)

Appendix D

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

After a hearing at which all sides had full opportunity to present evidence and argue their positions, the National Labor Relations Board has decided that we violated the National Labor Relations Act as amended, by failing to bargain collectively in good faith with Local Union No. 134, International Brotherhood of Electrical Workers (your duly authorized exclusive collective bargaining representative), through our unilateral discontinuance and withdrawal of various of your job benefits (namely, Christmas gift, bonus, or payment; 5-minute paid wash-up period at quitting time; vacation-scheduling system; paid group insurance for your dependents; furnishing of COLA schedules and payment of COLAs due on and since August 30, 1982) and through our failure to permit your Union to see our books and records to verify claims by us that our financial competitive condition is being impaired by your wage and other bargaining demands.

WE WILL NOT do these or similar things any more.

WE WILL at once reinstate the benefits we have discontinued, and pay you, with interest, for their value; and WE WILL maintain them in effect until the outcome of resumed collective bargaining with your Union.

WE WILL, upon request, resume collective bargaining with your Union, and WE WILL bargain in good faith with your Union concerning your wages, hours, and other terms and conditions of employment, and place into writing and sign any agreement reached. WE WILL ALSO, in connection with such resumed collective bargaining, make available to your Union at its request our financial books, records, entries and data regarding any claim we make as to financial hardship or difficulty to meet your wage and other demands, including harm to our competitive standing in the industry.

The collective bargaining unit is:

> All production and maintenance employees employed by American Fluorescent Corp. in its plant located at 3800 North Milwaukee Avenue, Chicago, Illinois 60641, and excluding all office and clerical employees, plant guards and supervisors, as defined in the Labor-Management Relations Act of 1947, as amended.

AMERICAN FLUORESCENT CORP.
(Employer)

Dated _____ By_____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Everett McKinley Dirksen Building, 219 S. Dearborn Street, Chicago, Illinois 60609 (Telephone No. (312) 353-7574)

Appendix E

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

After a hearing at which all sides had full opportunity to present evidence and argue their positions, the National Labor Relations Board has decided that we violated the National Labor Relations Act as amended, by failing to bargain collectively in good faith with Local Union No. 134, International Brotherhood of Electrical Workers (your duly authorized exclusive collective bargaining representative), through our unilateral discontinuance and withdrawal of various of your job benefits (namely, vacation-scheduling system; paid group insurance for your dependents; furnishing of COLA schedules and payment of COLAS due on and since August 30, 1982) and through our failure to permit your Union to see our books and records to verify claims by us that our financial condition is being impaired by your wage and other bargaining demands.

WE WILL NOT do these or similar things any more.

WE WILL at once reinstate the benefits we have discontinued, and pay you with interest, for their value; and WE WILL maintain them in effect until the outcome of resumed collective bargaining with your Union.

WE WILL, upon request, resume collective bargaining with your Union, and WE WILL bargain in good faith with your Union concerning your wages, hours, and other terms and conditions of employment, and place into writing and sign any agreement reached. WE WILL ALSO, in connection with such resumed collective bargaining, make available to your Union at its request our financial books, records, entries and data regarding any claim we make as to financial hardship or difficulty to meet your wage and other demands, including harm to our competitive standing in the industry.

The collective bargaining unit is:

> All production and maintenance employees employed by House-O-Lite Corporation in its plant located at 4041 South Emerald Avenue, Chicago, Illinois 60609, and excluding all office and clerical employees, plant guards and supervisors, as defined in the Labor-Management Relations Act of 1947, as amended.

HOUSE-O-LITE CORPORATION
(Employer)

Dated_____ By_____
(Representative) (Title)

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No. 85-1997

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

Petitioner,

v.

HARVSTONE MANUFACTURING CORP., DURAY FLUORESCENT MANUFACTURING CO., AMERICAN FLUORESCENT CORP. and HOUSE-O-LITE CORP.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS HARVSTONE MANUFACTURING CORP., DURAY FLUORESCENT MANUFACTURING CO., AMERICAN FLUORESCENT CORP. and HOUSE-O-LITE CORP. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the fact-specific resolution and application of well-established federal law by the Seventh Circuit Court of Appeals is appropriate for Writ of Certiorari.

STATEMENT REQUIRED BY RULE 28.1

Duray Fluorescent Manufacturing Co. is affiliated with Esco International, Inc. American Fluorescent Corp. is affiliated by means of common ownership with AFCO-Lite Corp. And House-0-Lite Corp. is affiliated by means of common ownership with Haggerty Enterprises, Inc. and Creators Lamp Corp.

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Respondents, HARVSTONE MANUFACTURING CORP., DURAY FLUORESCENT MANUFACTURING CO., AMERICAN FLUORESCENT CORP. and HOUSE-O-LITE CORP., oppose the Petition for a Writ of Certiorari[1]

[1] The Petition was filed by the Union only. It is significant that the National Labor Relations Board, the federal agency charged with the responsibility of enforcing the National Labor Relations Act, has not petitioned this Court for a Writ of Certiorari.

because the decision below is fact-specific and presents no special and important reason for Supreme Court review, and because the decision below does not conflict with decisions of this Court or with other courts of appeals.

COUNTERSTATEMENT OF THE CASE

Respondents Harvstone Manufacturing Corp., Duray Fluorescent Manufacturing Co., American Fluorescent Corp., and House-O-Lite Corp. (hereinafter referred to as "Respondents" or "employers") were engaged in collective bargaining with the Petitioner Union, but no agreement was reached.

During bargaining, the employers resisted certain Union-proposed increases in wages and benefits. The employers instead sought relief, pointing out that their competition in the fluorescent light fixture business enjoyed lower wage and benefit costs. The bargaining failed to produce any agreements. Following the expiration of the collective bargaining agreements, the Respondents implemented several unilateral changes in their employees' terms and conditions of employment.

Subsequently, the Union filed unfair labor practice charges under the National Labor Relations Act alleging essentially (1) that the employers had pleaded an "inability to pay" and, therefore, their refusal to disclose financial records constituted a refusal to bargain; and (2) that a wage increase was due the employees under a cost-of-living clause ("COLA") in the expired collective bargaining agreements. The Administrative Law Judge held that the Respondents' obligation under the COLA clause to pay the employees had accrued. Therefore, the Respondents' had improperly insisted on bargaining to impasse on the subject and had unlawfully instituted unilateral changes as a result. (P.App. 40a-46a). The Administrative Law Judge also held that the Respondents' failure to disclose financial data was an unfair labor practice under 29 U.S.C. § 158(a)(5)and (1) (P.App. 5a-6a, 50a).

The National Labor Relations Board affirmed the decision of the Administrative Law Judge but based its decision solely on the finding that the Respondents failed to bargain in good faith by refusing to disclose financial data after pleading an inability to pay. (P.App. 5a, 28a-29a). *Harvstone Manufacturing Corp.*, 272 N.L.R.B. 939 (1984). The Court of Appeals reversed the Board, denying enforcement of the essential portions of its order. The Seventh Circuit found that Respondents Harvstone, American Fluorescent and House-O-Lite had never claimed an inability to pay, but instead, were simply unwilling to meet the Union's demands (P.App. 12a, 20a). In addition, the court further found that all four Respondents had been under no obligation to pay an adjustment in accordance with the COLA clauses contained in expired collective bargaining agreements (P.App. 19a, 20a). *NLRB v. Harvstone Manufacturing Corp.*, 785 F.2d 570 (7th Cir. 1986).

ARGUMENT—REASON WHY THE WRIT SHOULD BE DENIED

The Writ Should Be Denied Because The Decision Below Is Fully Consistent With The Decisions Of This Court And Presents No Conflict With Decisions Of Other Circuit Courts of Appeals.

Cost-Of-Living Clause

This portion of the case involved the interpretation of a cost-of-living clause ("COLA") in the parties' collective bargaining agreements. The points of reference for the COLA calculations were during the life of the agreement. But the effective date on which the obligation to pay the final adjustments arose, occurred *after* the contract expired (P.App. 16a-19a).

The Union asserted that the employees were nevertheless entitled to the COLA increase, but the Respondents disagreed, reasoning that since the contract called for an increase *after* the contract had expired, the Respondents were under no contractual obligation to pay the adjustment. The Seventh Circuit agreed with the Respondents, and found that they had not been obligated to pay the COLA adjustment (P.App. 19a, 20a).

As the court of appeals stated, the "debate centers around whether the Respondents were obligated to make an adjustment effective September 1, 1982, even though the agreements between the parties expired on August 31, 1982." (P.App. 17a). As the court of appeals correctly decided, this cost-of-living issue "involves nothing more than a debate over contractual interpretation." (P.App. 17a).

Labor arbitrators, or in certain cases the National Labor Relations Board, are frequently called upon to interpret detailed clauses in labor contracts. But this fact-specific, and

routine task clearly fails to supply the "special and important reasons" necessary to warrant review by the United States Supreme Court.

Moreover, the Seventh Circuit's decision is not in conflict with decisions of this Court or with the decisions of the other circuits. Petitioner's assertion that a conflict exists is completely unfounded. *Meilman Food Industries, Inc.*, 234 N.L.R.B. 698, *enforced without opinion*, 593 F.2d 1371 (D.C. Cir. 1979), upon which Petitioner relies for its assertion, does not conflict with the Seventh Circuit's decision. The District of Columbia Circuit there affirmed, without opinion, the Board's fact—specific resolution of a contract clause which "require[d] no construction or interpretation beyond its plain meaning." Clearly, nothing more was required than interpreting a contract provision. Similarly, the Seventh Circuit in this case simply interpreted the parties' agreements. Thus, plainly, there is no conflict in reasoning or in the application of legal precedent between *Meilman Food Industries, Inc.* 234 N.L.R.B. 698, *enforced without opinion*, 593 F.2d 1371 and the Seventh Circuit's decision. Rather, the cases merely reflect different interpretations of different contractual provisions. Interpreting a specific labor contract clause falls far short of the threshold showing required by the Supreme Court to grant review.

Refusal to Supply Data.

An employer who asserts during negotiations that it is unable to meet a union's financial demands must provide substantiating data. *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149, 153 (1956). This is not the case, however, where an employer is simply unwilling to grant a raise. This distinction has long been recognized and remains valid. *See Empire Terminal Warehouse Co.*, 151 N.L.R.B. 1359, 1360 (1965), *enforced sub nom., Dallas General Drivers, Local No. 745 v. NLRB*, 355 F.2d 842 (D.C. Cir. 1966); *United Fire Proof Warehouse Co. v. NLRB*, 356 F.2d 494 (7th Cir. 1966); *Charles*

E. Honaker, 147 N.L.R.B. 1184, 1187-88 (1964). *See also New York Printing Pressmen v. NLRB*, 538 F.2d 496, 500 (2d Cir. 1976). In *Dallas General*, 355 F.2d at 845, the Board refused to order the company to reveal its financial data. The court affirmed this decision, reasoning that the company's refusal "was not based on a claim of financial inability but on the ground that it was paying rates in excess of prevailing rates of competition in the same labor market." Using similar reasoning, the Seventh Circuit correctly found that the employers here merely refused to grant a raise; this was "not a plea of inability to pay" (P.App. 11a). Rather, as the court observed, "the record indicates that the Respondents were simply unwilling to meet the Union's demands" (P.App. 12a).

To say there is a conflict between this Court's precedent and the Seventh Circuit's decision is inaccurate. The decision below turned simply on the application of the facts to well-settled principles. The determination was not what standard to apply, but was simply whether the facts met the well-established "inability to pay" standard. *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149. Each "bargaining" case is different, and while it may be suited to a determination by the National Labor Relations Board, or by a federal appellate court, this is not so with the United States Supreme Court. Cases involving only another examination of the facts, which have already undergone several layers of review, are inappropriate for a Writ of Certiorari. *See, e.g., Wilkerson v. McCarthy*, 336 U.S. 53, 66 (Frankfurter, J., concurring).

The Seventh Circuit Court of Appeals did not decide an important issue of federal law which has not been decided by this Court, nor does its decision conflict with applicable decisions of this Court or other courts of appeals. Petitioner simply disagrees with the Seventh Circuit's application of settled federal law and its interpretation of the collective bargaining agreements.

CONCLUSION

For the reasons stated, the Petition should be denied. The decision below is consistent with decisions of this Court and the other courts of appeals concerning collective bargaining, labor contracts and the obligation to bargain in good faith.

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v.

HARVSTONE MANUFACTURING CORP., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

Petitioner seeks review of the court of appeals' decision denying enforcement of a National Labor Relations Board decision that the respondent employers violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by refusing petitioner's request to inspect their financial records and by unilaterally instituting changes in terms of employment.

1. Respondents, manufacturers of fluorescent lighting equipment in the Midwest, were parties to contracts with petitioner, Local 134, International Brotherhood of Electrical Workers. The contracts were substantially similar and all were due to expire on August 31, 1982. In the months preceding that expiration date, the parties held bargaining sessions at which one attorney represented all respondents. Although the attorney conducted separate negotiating

sessions for each employer, the parties treated the discussions at each session as relating to all of the employers. Pet. App. 3a-4a, 40a; Tr. 26-27, 178, 192.[1]

During those negotiations the employers sought concessions in wages, regularly scheduled cost-of-living adjustments, and other benefits. In support of these proposals they cited data purporting to show that their labor costs were higher than those of competitors in other regions. Petitioner opposed the concessions and proposed instead that wages and benefits be increased. SX 6; Tr. 75-78, 109, 112-113, 135, 137-138, 192-193, 216.

The employers' representative stated at various times that the employers had made a "business judgment" that reduced labor costs were required to enable the firms to remain competitive in the industry; that " 'relief on labor costs' was essential"; that the employers needed relief "to 'stay in business [or] no one will have jobs' "; and that the employers " 'could, but . . . . not necessarily . . . . would * * * * go out of business' " without concessions (Pet. App. 48a-49a (citations omitted)). When petitioner asked, " 'Are you saying that if we don't give you the reductions in labor costs * * * [the employers] will go out of business?,' " the employers' representative replied that " '[t]hey might or they might not,' " *id.* at 49a; Tr. 101, 266-267. In response, petitioner demanded to examine the employers' financial records. The employers refused, stating that they were "not pleading poverty." SX 6; Pet. App. 47a-48a.

In the absence of a new agreement, the old contracts expired on August 31, 1982. The expired contracts had provided for a cost-of-living adjustment (COLA) to take

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[1] "Tr." refers to the transcript of the hearing before the administrative law judge. "SX," "JX," and "GCX" refer, respectively, to the stipulated exhibits, joint exhibits, and General Counsel's exhibits introduced at that hearing.

effect each September 1, based on a calculation from the consumer price index of the preceding July. Following expiration of the contracts, and consistent with their proposals on the issue during negotiations, the employers declined to pay a COLA on September 1, 1982. The employers also implemented their final contract offers on several other issues, eliminating a paid "wash-up" period, established vacation schedules, and certain insurance benefits. Pet. App. 17a, 40a-41a; JX 1, GCX 1(m), (q).

2. The Board, affirming the administrative law judge, found that the employers violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to allow petitioner to inspect their financial records (Pet. App. 28a-29a, 47a-50a). The Board concluded that the employers had asserted an inability to afford petitioner's bargaining demands and were therefore required to make records available to permit verification of their claimed inability to pay (see *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149, 152-153 (1956)).

The Board also agreed with the administrative law judge that the employers' refusal to permit inspection of their financial records precluded the parties from reaching a bona fide impasse in negotiations, and that in the absence of such an impasse the employers violated Section 8(a)(5) and (1) of the Act by unilaterally eliminating the COLA and changing other terms of employment (Pet. App. 50a).[2] The

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[2]The administrative law judge also found that the employers had a binding obligation to pay the September 1982 COLA under the terms of the expired contract; thus, respondents' proposals during negotiations to eliminate that COLA constituted "insistence upon bargaining concerning a 'nonmandatory' subject on which [petitioner] was not obligated to bargain" that also precluded a bona fide impasse (Pet. App. 40a-46a). The Board, however, did not reach the question whether payment of the September 1982 COLA was a previously bargained obligation under the terms of the old contract; rather, it relied solely upon the employers' refusal to allow inspection of financial records in

Board's order required the employers, inter alia, to make their financial records available to petitioner, to reinstate the terms of employment that had been unilaterally changed, and to make employees whole for losses caused by those unilateral changes (Pet. App. 29a, 53a-69a).

3. The court of appeals modified and enforced the Board's order as to one of the employers (Duray Fluorescent Manufacturing Co.) and denied enforcement as to the other three employers (Pet. App. 1a-26a).

The court acknowledged that an employer that claims to be unable to meet proposed economic terms has an obligation to accede to a union's request for verifying financial data. The court stated, however, that "the mere assertion by an employer that it is operating at a competitive disadvantage does not, in and of itself, constitute a claim of inability to pay." Pet. App. 7a. Rather, the court added, "[t]he relevant test * * * is to ascertain whether the employer said it 'would not' as opposed to 'could not' pay the employees' proposed demands" (*id.* at 7a-8a (footnote omitted)).

Noting that Duray conceded that its answer to the unfair labor practice complaint had asserted an inability to pay, the court concluded that "[o]n this basis alone * * * there is

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finding that a valid impasse had not been reached (*id.* at 28a n.1). Thus, in the Board's view, wholly apart from the question whether the employers had a contractual obligation to pay the September 1982 COLA, the employers were obliged under Section 8(a)(5) of the Act to refrain from unilaterally changing existing terms and conditions of employment (including the practice of making COLA payments in September), as defined by the expired agreements, until the parties reached either a new agreement or a legitimate impasse. See *NLRB* v. *Katz*, 369 U.S. 736, 741-748 (1962); *NLRB* v. *Carilli*, 648 F.2d 1206, 1214 (9th Cir. 1981).

Finally, contrary to the administrative law judge, the Board found that the employers' unilateral changes in certain Christmas bonuses, prizes, and parties did not violate the Act because those items were gifts rather than terms and conditions of employment (Pet. App. 28a n.1, 40a, 45a-46a, 50a).

substantial evidence to support the Board's finding" as to Duray (Pet. App. 9a-10a). As to the other employers, however, the court concluded that "they never implied that they were financially unable, as opposed to unwilling, to meet the Union's demands," but rather had merely demanded concessions in order to be competitive (*id.* at 10a).[3]

The court also rejected petitioner's contention that the record could not support a finding of impasse because: (1) the terms of the expired contracts required payment of the September 1982 COLA and (2) the employers were thus not entitled to insist upon eliminating that payment during negotiations. The court found that the expired contracts "provided that cost-of-living adjustments would be effective on each March 1 and September 1 during the life of the agreements" (Pet. App. 17a), and "[s]ince the September 1, 1982, effective date occurred after the expiration of the collective bargaining agreements, the [employers] were not obligated to pay the adjustment in question" (*id.* at 19a). Accordingly, the court concluded that the employers "did not violate the Act or their agreements by bargaining to an impasse over the cost-of-living adjustment" (*ibid.*).

4. Petitioner does not dispute the established principle that "simple unwillingness to meet the employees' demands, rather than inability to do so" does not trigger an employer's obligation to provide financial data to the employees' bargaining representative. *ACL Corp. d/b/a*

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[3]In rejecting the Board's contrary conclusion, the court stated (Pet. App. 10a): "[T]he ALJ knitted together a smattering of words and phrases, and from this compilation derived his finding that the [employers] pleaded inability to pay. A review of the record as a whole leads us to conclude, however, that the ALJ took much of the testimony out of context and that in the proper perspective the three [employers], in seeking concessions, had not claimed inability to pay."

Judge Swygert dissented from the denial of enforcement as to the three employers (Pet. App. 21a-26a).

Atlanta Hilton & Tower, 271 N.L.R.B. 1600, 1602 (1984). Accord *New York Printing Pressmen & Offset Workers Union No. 51* v. *NLRB*, 538 F.2d 496, 500 (2d Cir. 1976); *NLRB* v. *Unoco Apparel, Inc.*, 508 F.2d 1368, 1370 (5th Cir. 1975); *United Fire Proof Warehouse Co.* v. *NLRB*, 356 F.2d 494, 498 (7th Cir. 1966). See also *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. at 152-153. Rather, petitioner contends (Pet. 18-19) that the court of appeals erred in rejecting the Board's finding that all of the respondent employers asserted an inability to meet petitioner's bargaining demands and were thus required to grant access to their financial records. While the Board believes that the court should have upheld that finding, the Board has not filed its own petition for a writ of certiorari because in its judgment the difference between the Board and the court presents essentially a factual issue that does not warrant review by this Court.[4] See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

Similarly, petitioner's challenge (Pet. 13-18) to the court's finding that the expired contracts did not require the employers to pay the September 1982 COLA raises a

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[4]Petitioner contends (Pet. 18-19) that the admission of an inability-to-pay claim in employer Duray's answer was binding on the other three employers. In support of that contention petitioner relies on this Court's decisions in *Charles D. Bonanno Linen Service* v. *NLRB*, 454 U.S. 404 (1982), and *NLRB* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87 (1957). Those decisions do not conflict with the decision below. *Bonanno* held that a bargaining impasse does not itself justify an employer's withdrawal from a multiemployer bargaining unit, and *Truck Drivers* held that members of a multiemployer association may engage in a lockout as a defense to a strike against one member. Those decisions deal with the permissible scope of economic action by employers engaged in multiemployer bargaining; they do not hold that a single employer's answer binds other employers where in the court's view the evidence shows that the other employers had never made such a claim.

factbound issue respecting interpretation of the particular contract involved here.[5]

Respectfully submitted.

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[5]Contrary to petitioner's contention (Pet. 13-18), there is no conflict between the court's interpretation of the contract here and the decision in *Meilman Food Industries, Inc.*, 234 N.L.R.B. 698 (1978), enforced, 593 F.2d 1371 (D.C. Cir. 1979) (Table). In *Meilman*, the Board held that a cost-of-living adjustment had accrued under a contract even though its effective date fell after the expiration of the contract. As the court below explained (Pet. App. 18a-19a), however, the Board relied on clear contractual language providing that the obligation to pay the adjustment accrued as of the date it was calculated, rather than on the date it became effective. See *Meilman*, 234 N.L.R.B. at 698, 704. Here, by contrast, although the July 1 calculation date is mentioned in the contracts, there was "no language in the agreements establishing the review dates as the time at which the cost-of-living adjustments became contractually enforceable rights in the hands of the employees," and the "contractual duty to pay such adjustments arose * * * only on the effective dates during the life of the agreements" (Pet. App. 18a-19a).